BRB Nos. 08-0130

B.N.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SHIPPERS STEVEDORING COMPANY	)	DATE ISSUED: 06/27/2008
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

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

Lewis S. Fleishman (Cassidy, Raub & Fleishman, PLLC), Houston, Texas, for claimant.

C. Douglas Wheat and Gus David Oppermann V (Wheat, Oppermann & Meeks, P.C.), Houston, Texas, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order (2006-LHC-32) of Administrative Law Judge Lee J. Romero, 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).

On July 20, 2004, claimant sustained an injury to his back during the course of his employment as a walking foreman with employer.[1] Claimant was subsequently diagnosed with a Grade 3 herniated disc, and a right L5/S1 discectomy was performed on claimant's back on October 19, 2005. Claimant filed a claim for temporary total disability benefits from July 21, 2004, through May 21, 2006, and for continuing temporary partial disability benefits from May 22, 2006, when he commenced employment with Houston Container Connection.[2]

In his Decision and Order, the administrative law judge found that claimant established a causal relationship between his employment with employer and his present physical condition. Further, the administrative law judge determined that claimant's condition is temporary in nature, that claimant is unable to return to his former employment duties with employer as a walking foreman, and that claimant's new position with Houston Container Connection established the availability of suitable alternate employment. Accordingly, the administrative law judge awarded claimant temporary total disability compensation from July 21, 2004, through May 21, 2006, and temporary partial disability compensation from May 22, 2006, and continuing. 33 U.S.C. §908(b), (e). Lastly, the administrative law judge awarded claimant all reasonable, appropriate and necessary medical expenses related to his July 20, 2004, work-injury, and he held employer liable for an assessment pursuant to Section 14(e) of the Act, 33 U.S.C. §914(e).

On appeal, employer challenges the administrative law judge's findings regarding the nature and extent of claimant's disability and claimant's entitlement to medical benefits. Claimant responds, urging affirmance of the administrative law judge's decision in its entirety.

Employer initially contends that the administrative law judge erred in failing to find that claimant's condition reached maximum medical improvement. We disagree. The determination of when maximum medical improvement is reached is primarily a question of fact based on medical evidence. *Beumer v. Navy Personnel Command/MWR*, 39 BRBS 98 (2005); *Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988). A claimant has reached maximum medical improvement when he is no longer undergoing

[1] On the day of his work-injury, claimant was positioned on the top of a railcar assisting in the loading of steel beams. As a load of steel beams swung in his direction, claimant jumped ten feet to the ground, landing on his feet.

[2] Employer voluntarily paid claimant temporary total disability benefits for the period of July 23, 2004, through November 23, 2004. 33 U.S.C. §908(b).

treatment with a view toward improving his condition. *See Gulf Best Electric, Inc. v. Methe,* 396 F.3d 601, 38 BRBS 99(CRT) (5th Cir. 2004); *Louisiana Ins. Guaranty Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994).

In support of its allegation of error, employer asserts that the opinions of Drs. Ciepiela, Vanderweide, and Weiner establish that claimant's condition has reached a state of permanency.[3] In concluding that claimant had not yet reached maximum medical improvement, the administrative law judge relied upon the opinion of Dr. Esses, claimant's treating physician who also performed claimant's back surgery on October 19, 2005. Specifically, the administrative law judge found that Dr. Esses was the only physician who saw claimant's September 9, 2005, discogram, which revealed dye extravasation at the L5/S1 level, prior to rendering an opinion on whether claimant's condition had reached permanency. Additionally, the administrative law judge found that Dr. Esses both performed claimant's back surgery and treated claimant post-surgery, while Drs. Vanderweide and Ciepiele each saw claimant on one occasion, and Dr. Weiner did not see claimant after November 23, 2004. Moreover, the administrative law judge reasoned that while Dr. Weiner speculated that claimant would be fully recovered within 6 months after surgery, *i.e.*, by April 2006, Dr. Esses at the time of his May 12, 2006, deposition believed claimant had not yet reached maximum medical improvement and that his condition could be improved if fusion surgery were performed. Decision and Order at 26 – 27; CX 21. *See Methe*, 396 F.3d 601, 38 BRBS 99(CRT). As the administrative law judge rationally found the opinion of Dr. Esses entitled to the greatest weight, his conclusion that claimant has not reached maximum medical improvement is supported by substantial evidence. *Abbott,* 40 F.3d 122, 29 BRBS 22(CRT). We therefore affirm the administrative law judge's finding on this issue.

Employer next challenges the administrative law judge's determination that claimant is incapable of returning to his usual employment duties with employer. Specifically, employer contends that the administrative law judge erred in relying on the opinion of Dr. Esses in addressing the extent of claimant's disability. We disagree. It is well-established that claimant bears the burden of establishing the 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 & Constr. Co.*, 17 BRBS 56 (1985). In order to establish a *prima facie* case of total disability, claimant bears the burden of

[3] Dr. Ciepiela opined that claimant reached maximum medical improvement on September 2, 2004, the day on which claimant received an epidural steroid injection that provided him with no relief. EX 11. Dr. Vanderweide opined that claimant reached maximum medical improvement on November 24, 2004. EX 6. Dr. Weiner stated that a patient undergoing a discectomy should reach full recovery within six months of the procedure. EX 23.

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 credited the opinion of Dr. Esses, claimant's treating physician and operating surgeon, who stated that claimant is presently unable to resume his usual employment duties as walking foreman since he should avoid prolonged sitting and operating machinery, heavy lifting, bending, twisting, and ascending and descending ladders.[4] CX 21. In declining to rely upon the contrary opinion of Dr. Vanderweide, who opined that claimant could return to work without restrictions as of November 23, 2004, the administrative law judge stated that this physician saw claimant on one occasion and did not provide treatment to claimant. EX 6. In similarly declining to rely upon the opinions of Drs. Ciepiele and Weiner, the administrative law judge found that each of these physicians released claimant to return to work as a walking foreman with restrictions that were incompatible with his usual employment duties as a walking foreman for employer, and that Dr. Weiner, in rendering his opinion, was under the misunderstanding that claimant's usual employment duties with employer did not entail a significant amount of physical labor. EXs 11, 23.

The administrative law judge, as the trier-of-fact, is entitled to evaluate the weight given the medical evidence, *see Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), and his decision must be affirmed if it is supported by substantial evidence. *O'Keeffe*, 380 U.S. 359. As the administrative law judge rationally credited the opinion of Dr. Esses, his finding that claimant established an inability to perform his usual employment duties with employer is supported by substantial evidence. *See generally Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). Accordingly, we affirm the administrative law judge's finding that claimant established a *prima facie* case of total disability through May 21, 2006, the day claimant acknowledges he commenced employment with Houston Container Connection. *See Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989).

[4] Claimant described his employment duties with employer as eighty percent physical in nature. Specifically, claimant testified that his usual employment duties as a walking foreman included climbing eight-to-nine foot containers, welding, using a sledgehammer, making various repairs to containers, operating heavy machinery, and prolonged sitting. Tr. at 41 – 44. Mr. Cotton, who is presently employed by employer as a walking foreman, similarly testified as to the physical nature of that position. CX 22.

Lastly, employer challenges the administrative law judge's award of medical expenses related to claimant's work-injury; specifically, employer contends that once claimant's condition reached permanency on November 23, 2004, claimant was in need of no further medical treatment as a result of his work injury. We affirm the administrative law judge's award of medical benefits to claimant.

Section 7(a) of the Act, 33 U.S.C. §907(a), states:

> The 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.

Thus, once claimant has established that his injury is work-related, employer is liable for reasonable and necessary medical expenses related to that injury. *See Weikert v. Universal Maritime Serv. Corp.*, 36 BRBS 38 (2003); *Romeike v. Kaiser Shipyards*, 22 BRBS 57 (1989); 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).

The administrative law judge found that employer refused to provide claimant with any medical treatment, including surgery, recommended by Dr. Esses. Next, the administrative law judge determined that the opinion of Dr. Esses, as claimant's treating physician, was entitled to greater weight, and he concluded that the October 19, 2005, discectomy performed by Dr. Esses was both reasonable and necessary[5] and that claimant required supervised physical therapy for his back condition. Decision and Order at 35. Consequently, the administrative law judge found employer liable for the medical costs associated with claimant's work-injury, including the discectomy performed by Dr. Esses. The administrative law judge's decision to rely upon the testimony of Dr. Esses is rational and within his authority as factfinder. Accordingly, as the administrative law judge's finding regarding claimant's need for surgery and physical therapy is supported by substantial evidence, his award of medical benefits associated with claimant's July 20, 2004, work-related injury is affirmed. *See Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *Pozos v. Army & Air Force Exch. Serv.*, 31 BRBS 173 (1997).

[5] The administrative law judge, in addressing the issue of the claimant's surgery, found that Dr. Weiner testified that the discectomy performed on claimant by Dr. Esses in October 2005 was the same procedure that had been considered by Dr. Weiner's partner, Dr. Randall, in October 2004. Additionally, when discussing claimant's October 2005 surgery, Dr. Weiner stated that "I probably would not have done it, but I can't argue with the fact that [Dr. Esses] did it." EX 23 at 24.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge