BRB Nos. 97-1105
and 97-1105A

JERRY JOSEPH GAUTHREAUX	)	
	)	
Claimant-Respondent	)	DATE ISSUED:
Cross-Petitioner	)	
	)	
v.	)	
	)	
AVONDALE INDUSTRIES, INCORPORATED	)	
	)	
	)	
Self-Insured	)	
Employer-Petitioner	)	)
Cross-Respondent	)	DECISION and ORDER

Appeals of the Decision and Order, Decision on Motion for Reconsideration and Supplemental Decision and Order-Awarding Attorney Fees of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Richard M. Millet, LaPlace, Louisiana, for claimant.

Richard S. Vale, Metairie, Louisiana, for self-insured employer.

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

PER CURIAM:

Employer appeals and claimant cross-appeals the Decision and Order and Decision on Motion for Reconsideration and employer appeals the Supplemental Decision and Order-Awarding Attorney Fees (96-LHC-311) of Administrative Law Judge C. Richard Avery 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 which 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). The amount of an attorney's fee award is discretionary and may only be set aside if shown by the challenging party to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant injured his back on September 3, 1991, while working for employer as a crane operator. He was diagnosed initially with a contusion and lumbar strain and received conservative treatment. Claimant attempted to return to work on January 15, 1992, at which time he alleged he was unable to work as a crane operator due to back problems resulting from his assignment to a crane with two foot pedals. Claimant thereafter was treated by Dr. Adatto, an orthopedic surgeon, and he did not return to work again until April 21, 1992. Upon his return, claimant was assigned to an automatic crane which was operated by handles rather than foot pedals, and he was able to work successfully until July 20, 1992, when he was again assigned to a crane with four foot pedals. Claimant testified that although he tried to operate this machine for a day and a half, he ended up in first aid and was sent home, and the next day Dr. Adatto took him off work. Claimant did not work again thereafter until April 1993, when he worked as a security guard for employer, but left after only six hours, allegedly because he could not perform the work due to pain. He subsequently applied for, and tried to work at one of, several alternate crane operator positions identified by Ms. Favaloro, employer's vocational rehabilitation counselor, but alleged that he was unable to perform the work. Claimant was evaluated by a number of physicians, including two psychiatrists. Employer voluntarily paid claimant various periods of temporary total and temporary partial disability benefits. Claimant sought additional temporary total disability compensation and medical benefits, including authorization to undergo lumbar fusion surgery recommended by Dr. Adatto.

The administrative law judge awarded claimant temporary total disability benefits from September 3, 1991, until April 21, 1992, and from July 20, 1992, until April 2, 1993, and temporary partial disability benefits from April 21, 1992, to July 20, 1992, and from April 2, 1993, and continuing. Additionally, he found employer liable for claimant's future medical treatment related to the injury, including future treatment in a pain clinic and/or the back surgery recommended by Dr. Adatto. Employer's motion for reconsideration was summarily denied on April 28, 1997. In a Supplemental Decision and Order-Awarding Attorney Fees, the administrative law judge awarded claimant's counsel $25,143.75 for 201.15 hours of services at $150 per hour, plus $1,384.63 in expenses.

On appeal, employer challenges the administrative law judge's award of temporary total and temporary partial disability benefits as well as his determination

that employer is liable for claimant's continued medical care by Dr. Adatto. Employer also appeals the Supplemental Decision and Order-Awarding Attorney Fees. Claimant responds, asserting that employer's arguments should be rejected. Claimant also cross-appeals, contending that the administrative law judge erred in awarding temporary partial disability benefits commencing April 2, 1993, rather than temporary total disability benefits, arguing that the security guard position employer offered him at that time at its facility did not constitute suitable alternate employment. Employer replies, urging affirmance of the administrative law judge's determination that the security guard position at its facility constituted suitable alternate employment.

To establish a *prima facie* case of total disability, the claimant must show that he cannot return to his regular or usual employment due to his work-related injury. *See Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989). If claimant succeeds in establishing that he is unable to perform his usual work duties, the burden shifts to the employer to establish the availability of suitable alternate employment which the claimant is capable of performing. *See Avondale Shipyards, Inc. v. Guidry,* 967 F.2d 1039, 26 BRBS 36 (CRT) (5th Cir. 1992). We affirm the administrative law judge's awards of temporary total disability benefits. In his Decision and Order, crediting claimant's testimony as corroborated by the opinion of Dr. Adatto, the administrative law judge found that for all times relevant to the current proceedings claimant was unable to return to his usual work due to pain, noting that he had made several unsuccessful attempts at doing so. Decision and Order at 13. He further concluded that inasmuch as all of the alternate positions identified by employer's vocational expert involved crane operator work, employer did not establish the availability of suitable alternate employment prior to April 2, 1993, when it offered claimant a suitable job as a security guard at its facility.

Employer initially argues that the administrative law judge erred in finding that claimant was unable to perform his usual crane operator work. With regard to the initial period of temporary total disability from January 14, 1992 until April 21,1992, employer specifically argues that in finding that claimant was unable to perform his usual work, the administrative law judge erred in relying on claimant's testimony that Dr. Adatto had taken him off work because it is contradicted by evidence that when Dr. Adatto evaluated claimant in January 1992, he released him to return to work as a crane operator with restrictions. Employer further avers that inasmuch as Drs. Juneau, Cullichia, Truax, Russo, Mabey, and Landry found no objective basis to support claimant's complaints of pain, opined that he was exaggerating his symptoms, and released him to return to work as a crane operator, the administrative law judge's award is not supported by substantial evidence.

We reject employer's arguments and affirm the administrative law judge. Contrary to employer's assertions, claimant's testimony that Dr. Adatto had taken him off work is consistent with the record, which reflects that Dr. Adatto restricted claimant from performing any work from January 27, 1992, until March 26, 1992, CX-1 at 4, 7, and then imposed restrictions on repetitive stooping, bending, or lifting objects over 25-50 pounds, and prolonged sitting or standing. The administrative law judge rationally found claimant's testimony credible, and credibility determinations may not be overturned unless they are inherently incredible or patently unreasonable. *See Cordero v. Triple A Machine Shop,* 580 F.2d 1331, 8 BRBS 749 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Inasmuch as employer has failed to demonstrate any reversible error in the administrative law judge's decision to credit this evidence, and employer does not dispute the administrative law judge's finding that suitable alternate employment was not established prior to April 1993, his award of temporary total disability compensation from January 14, 1992 through April 2, 1992 is affirmed.

With regard to the later period of temporary total disability from July 20, 1992, until April 3, 1993, employer argues that the administrative law judge erred in crediting Dr. Adatto's testimony because of all of the physicians providing relevant testimony only Dr. Adatto was of the opinion that claimant could not return to his employment as a crane operator. Moreover, employer asserts that Dr. Adatto's opinion was based solely on claimant's subjective complaints which Dr. Russo, a Board-certified orthopedic surgeon, characterized as incredible. Employer asserts that because this is not the situation where the physicians other than Dr. Adatto have seen the claimant only once or twice or where the claimant was seen by the other physicians for litigation purposes, his status as claimant's treating physician does not entitle his opinion to any special deference. Moreover, employer argues that because the remaining physicians who evaluated claimant found no objective reasons for his failure to return to work or for surgical intervention, the administrative law judge's award of these temporary total disability benefits should be reversed.

We affirm the administrative law judge's award of these temporary total disability benefits. The weighing of the evidence is solely within the administrative law judge's discretionary authority, and employer's mere recitation of evidence which supports its theory of the case is insufficient to establish that administrative law judge abused his discretion in crediting contrary testimony. *See generally Mendoza v. Marine Personnel Co., Inc.,* 46 F.3d 498, 29 BRBS 79 (CRT)(5th Cir. 1995). Inasmuch as Dr. Adatto's opinion that claimant was unable to perform any work from July 21, 1992, through May 13, 1993, CX 1 at 13, 34, provides substantial evidence to support the administrative law judge's award of temporary total disability compensation during this period, and employer has failed to demonstrate reversible

error in his weighing of the evidence, the award of temporary total disability benefits during this period is affirmed.

We next address employer's assertion that the administrative law judge erred in awarding claimant temporary partial disability compensation from April 21, 1992, until July 20, 1992. During this period, the administrative law judge found that although claimant was able to work 40 hours per week, he nonetheless sustained a loss in his wage-earning capacity because he could not work overtime due to pain resulting from his injury. Decision and Order at 3, 14. Employer argues on appeal that this finding is erroneous because: (1) claimant actually worked overtime in at least one of the weeks; (2) claimant's alleged inability to work is based solely on his subjective complaints which are not supported by the objective findings of at least 4 physicians; and (3) claimant in this case simply chose not to perform overtime.

We reject employer's arguments and affirm the administrative law judge's finding that claimant is entitled to this period of temporary partial disability compensation. Contrary to employer's assertions, the fact that claimant may have worked overtime one week during this period does not preclude a finding that he sustained a loss of wage-earning capacity based on a loss of overtime.[1] Employer's assertion that claimant chose not to perform overtime and that his inability to perform overtime is based solely on his subjective complaints also fails to demonstrate reversible error. Where, as here, claimant is attempting to establish entitlement to disability compensation based on a loss of overtime, the relevant inquiry is whether overtime was available to claimant and claimant was unable to work those hours due to his injury. *See Brown v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 110, 113 (1989). In the present case, inasmuch as employer does not dispute that overtime was available post-injury or that claimant worked overtime prior to the injury, and the administrative law judge acted within his discretionary authority in crediting claimant's assertions that he was unable to perform overtime work due to his back pain during the period in question, *Cordero,* 580 F.2d at 1331, 8 BRBS at 740, the award of temporary partial disability compensation from April 21, 1992, until July 20, 1992, is also affirmed. *See generally Everett v. Newport News Shipbuilding & Dry Dock Co.,* 23 BRBS 316 (1989).

[1]We note that the combination of claimant's regular and overtime earnings during that one week period did not equal claimant's stipulated average weekly wage which included overtime earned prior to the injury. *See* CX-11.

We next address the parties' contentions regarding the continuing award of temporary partial disability benefits commencing April 2, 1993. During this period, employer attempted to meet its burden of establishing the availability of suitable alternate employment by offering claimant a security guard job at its facility and through the introduction of Ms. Favaloro's vocational testimony. After finding that the alternate crane operator jobs identified in Ms. Favaloro's vocational survey were not suitable,[2] the administrative law judge determined that employer had nonetheless established the availability of suitable alternate employment as of April 2, 1993, by offering claimant a security guard position at its facility paying $5.25 per hour. The administrative law judge further concluded that claimant was not diligent in pursuing this work, and that he should have persevered in trying to adapt to this position which was sedentary and allowed him to alternate between sitting and standing consistent with Dr. Adatto's restrictions. In so concluding, he noted that claimant admitted that the work was "not hard," Tr. at 61, and that Dr. Adatto's opinions supported claimant's capability to perform this work. Decision and Order at 13.

On appeal, employer argues that because Drs. Russo, Landry, Juneau, Mabey, and Cullichchia, as well as claimant's functional capacity evaluation, noted inconsistencies and symptom magnification and each of these doctors released claimant to return to his usual work, the administrative law judge erred in awarding claimant any disability benefits after April 3, 1993. Employer asserts that the only physician who opined that claimant could not perform his usual work at that time was Dr. Adatto, whose opinion was based on claimant's description of the duties of a crane operator and his subjective complaints, which it posits are not credible. In the alternative, employer argues that in calculating the award of temporary partial disability compensation, the administrative law judge erred in determining that claimant's post-injury wage-earning capacity in the security guard job was $5.25 per hour because this job actually paid $5.95 per hour. In his appeal, claimant argues that he is entitled to temporary total disability compensation during this period because the record reflects that he tried but could not perform the security guard position due to pain and that thereafter Dr. Adatto again placed him on total disability.

[2]Employer does not challenge this finding on appeal.

We conclude that the case must be remanded for further consideration of claimant's entitlement to disability compensation subsequent to April 2, 1993, because in determining the extent of claimant's disability during this period the administrative law judge failed to fully consider, identify, and evaluate all of the relevant evidence as is required under the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A) [APA]. *See Cotton v. Newport News Shipbuilding & Dry Dock Co.,* 23 BRBS 380 (1990). Initially, we reject employer's argument that claimant was capable of performing his usual work as of April 2, 1993, for the reasons discussed previously. Inasmuch as the administrative law judge rationally found that claimant was incapable of performing his usual work based on his decision to credit claimant's subjective complaints and Dr. Adatto's medical opinion, *see Diosdado v. Newpark Shipbuilding & Repair, In*c., 31 BRBS 70 (1997), the relevant inquiry is whether he properly determined that the security guard job employer offered to claimant constituted suitable alternate work. *See generally Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78 (CRT) (5th Cir. 1991). In finding that the security guard job was suitable, the administrative law judge apparently relied on statements to that effect contained in Dr. Adatto's March 19, 1993, report. CX-1 at 32. However, after claimant actually attempted to perform this job, Dr. Adatto stated in his April 6, 1993, report that "He tried to do light work...They found a job that seems to fit the guidelines but he can't even do that because the pain is so intense...He really needs to consider surgery," and placed claimant on total disability from April 6, 1993 through May 13, 1993. CX- 1 at 34.[3] As this later evidence is relevant to whether the security guard job constituted suitable alternate employment, and it was not explicitly discussed or weighed by the administrative law judge in determining the extent of claimant's disability as of April 2, 1993, we vacate his award of temporary partial disability compensation commencing on this date and remand for him to reconsider the suitability of the security guard position. Although the administrative law judge also found that claimant was not diligent in pursuing this job, the issue of diligence does not become relevant until employer establishes the availability of a suitable job. *See Roger's Terminal and Shipping Corp. v. Director, OWCP,* 781 F.2d 687, 18 BRBS 79 (CRT) (5th Cir. 1986), *cert. denied*, 107 S.Ct. 101 (1986).

In the alternative, employer contends that the award of temporary partial disability compensation should be based on post-injury earnings of $5.95 per hour as the security guard job paid this amount rather than $5.25 per hour. Employer maintains that although the administrative law judge derived the $5.25 per hour

[3]Moreover, Dr. Adatto also indicated that claimant was totally disabled on several occasions thereafter. *See e.g.*, CX-1 at 37, 40.

figure from employer's LS-206 dated July 1, 1994, CX-12 at 4, that figure does not refer to claimant's job as a security guard but rather was based on a labor market survey conducted by Ms. Favaloro, and that an LS-206 based upon the security guard position reflecting a post-injury wage-earning capacity of $238 per week, or $5.95 per hour, was filed on April 6, 1993. Moreover, employer asserts that Mr. Duhon, its workers' compensation manager, stated at the hearing that the security job position paid $5.95 per hour.[4] Tr. at 215. Inasmuch as the administrative law judge summarily denied employer's motion for reconsideration which raised this issue without addressing the evidence, we vacate his finding regarding claimant's post-injury wage-earning capacity as a security guard. If, on remand, he reaffirms his prior determination that the security guard position at employer's facility constitutes suitable alternate employment, he should reconsider the issue of claimant's post-injury wage-earning capacity consistent with this evidence.

[4]Claimant argues in his response brief that Mr. Duhon's testimony was not a part of the formal record because his statement was made in an informal question and answer session and not under oath. Inasmuch, however, as Mr. Duhon testified during the course of the hearing, Tr. at 215, it is clearly part of the formal record. Claimant correctly asserts, however, that the LS-206 which employer filed on April 6, 1993, was not introduced into evidence.

Employer next argues that the administrative law judge erred in holding it liable for claimant's future medical care and the back surgery recommended by Dr. Adatto. Employer asserts that claimant did not meet his burden of establishing that the treatment recommended by Dr. Adatto was reasonable and necessary because five doctors found that claimant engaged in symptom magnification and found no objective evidence of injury, and Dr. Adatto, the only doctor who was of the opinion that such treatment was required, relied too heavily upon claimant's subjective complaints. As employer's assertion is nothing more than a request that we reweigh the evidence, this argument is rejected. *See Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28 (CRT) (D.C. Cir. 1994). 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 Western Corp.*, 20 BRBS 184 (1988). In order for a medical expense to be awarded, it must be reasonable and necessary for the treatment of the injury at issue. *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).

Contrary to employer's assertions, after fully considering the medical evidence upon which employer relies, the administrative law judge, acting within his discretionary authority, determined that he was unwilling to declare claimant to be malingering and without need of further medical attention. Decision and Order at 12. Moreover, he rationally determined, based on Dr. Adatto's testimony, that the treatment recommended was both reasonable and necessary. *Id.* Inasmuch as Dr. Adatto's testimony provides substantial evidence to support the administrative law judge's determination that the contested medical treatment is both reasonable and necessary, and employer has failed to establish any reversible error made by the administrative law judge, his determination that employer is liable for these benefits is affirmed.

Finally, we address employer's arguments relating to the attorney's fee award entered by the administrative law judge. The administrative law judge awarded claimant's counsel an attorney's fee of $25,143.75 for 201.15 hours of services at $150 per hour, plus $1,384.63 in expenses. On appeal, employer does not challenge the amount of the fee award. Rather, it requests that the Board stay enforcement of the fee award until such time as the underlying compensation award becomes final. Employer's request is denied, as a stay of the attorney's fee awards pending appeal is unnecessary. An attorney's fee award is not a compensation order, and it does not become effective until all appeals are exhausted. *See Thompson v. Potashnick*

Constr. Co., 812 F.2d 574 (9th Cir. 1987); *Wells v. International Great Lakes Shipping Co.*, 693 F.2d 663, 15 BRBS 47 (CRT)(7th Cir. 1982); *Spinner v. Safeway Stores, Inc.*, 18 BRBS 155 (1986), *aff'd mem. sub nom. Safeway Stores, Inc. v. Director, OWCP*, 811 F.2d 676 (D.C. Cir. 1987).

Accordingly, the administrative law judge's award of temporary partial disability compensation commencing as of April 2, 1993 is vacated, and the case is remanded for further consideration of the extent of claimant's disability during this period consistent with this opinion. In all other respects, the administrative law judge's Decision and Order and Decision and Order-Awarding Attorney Fees are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge