BRB Nos. 11-0220
and 11-0385

BILLY J. NICHOLS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CERES MARINE TERMINALS, INCORPORATED	)	
	)	
	)	
Self-Insured Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED: 11/30/2011
	)	
	)	
Party-in-Interest	)	
	)	
STEAMSHIP TRADE ASSOCIATION – INTERNATIONAL LONGSHOREMEN'S ASSOCIATION BENEFITS FUND	)	
	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits and Order Denial of Motion to Intervene of Daniel F. Solomon, Administrative Law Judge, United Sates Department of Labor.

Michael J. Perticone (Hardwick & Harris, LLP), Baltimore, Maryland, for claimant.

Lawrence P. Postol (Seyfarth Shaw LLP), Washington, D.C., for self-insured employer.

Brian G. Esders (Abato, Rubenstein and Abato, P.A.), Baltimore, Maryland, for Steamship Trade Association-International Longshoremen's Association Benefits Fund.

Jeffrey S. Goldberg (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: McGRANERY, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits and Steamship Trade Association – International Longshoremen's Association Benefit Fund (the Fund) appeals the Order Denial of Motion to Intervene (2009-LHC-00002) of Administrative Law Judge Daniel F. Solomon 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. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

On February 21, 2006, while working for employer, claimant slipped in oil and injured his abdomen and groin areas.[1] Claimant was diagnosed with a left inguinial hernia. Following the accident, claimant underwent surgery to repair the hernia and did not work for several periods. For his injury, the Fund paid claimant $14,300 in accident and sickness benefits for the period of October 24, 2007, to October 21, 2008. Claimant filed a claim for benefits under the Act on April 21, 2006. On December 19, 2007, the Fund advised the Office of Workers' Compensation Programs (OWCP) that it had a lien against any benefits awarded to claimant under the Act because of its payment of benefits for claimant's work-related injury. *See* 33 U.S.C. §917.

Claimant sought temporary total disability benefits for the periods of April 22 to June 27, 2006, and May 5, 2007, to December 8, 2008.[2] With respect to the first period, employer argued that the claim was barred pursuant to Section 7(d)(4), 33 U.S.C. §907(d)(4), because claimant unreasonably delayed surgery for two months. For the second period, employer contended that claimant was able to return to his usual employment and argued, in the alternative, that its offer to claimant of a van driving position and the June 20, 2007, labor market survey established suitable alternate employment. The administrative law judge found that claimant was unable to engage in

[1]Claimant was not a permanent employee of employer at this time.

[2]Claimant returned to work on December 9, 2008.

his usual employment during both time periods and that claimant, therefore, established his *prima facie* case of total disability. With respect to the first period, the administrative law judge rejected employer's contention that the Section 7(d)(4) bar applies. With respect to the second period, the administrative law judge found that employer's offer of a van driving position and its June 2007 labor market survey did not establish suitable alternate employment, and that it was claimant's subsequent pain management plan with Dr. Arrison that enabled him to return to longshore work on December 9, 2008. Accordingly, the administrative law judge awarded claimant temporary total disability benefits for both periods and ongoing medical benefits with Dr. Arrison. Employer appeals this decision, and claimant responds, urging affirmance. BRB No. 11-0220.

On November 30, 2010, the Fund filed an emergency motion to intervene before the administrative law judge, seeking to have its lien protected against any benefits awarded to claimant. In an Order dated February 4, 2011, the administrative law judge denied the Fund's motion. The Fund appeals the denial, and the Director, Office of Workers' Compensation Programs (the Director), responds, urging the Board to vacate the denial and remand the case for further consideration.[3] BRB No. 11-0385.

Employer contends that the administrative law judge erred in awarding temporary total disability benefits from May 5, 2007, to December 8, 2008,[4] because his findings that employer's offer of a van driver position and the 2007 labor market survey do not establish suitable alternate employment are not supported by substantial evidence. Employer further asserts that the administrative law judge's decision violates the Administrative Procedure Act (APA) because he failed to discuss and resolve inconsistencies in the record.

Where, as in this case, a claimant is unable to perform his usual job, he has established a *prima facie* case of total disability and the burden shifts to the employer to demonstrate the availability of suitable alternate employment that the claimant is capable of performing. *Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109(CRT) (4th Cir. 1988); *see also Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988); *Trans-State Dredging v. Benefits Review Board*, 731 F.2d 199, 16 BRBS 74(CRT) (4th Cir. 1984). Employer may meet its burden by offering an injured employee a light-duty job in its facility which is tailored to the employee's physical limitations, *Peele v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 133

[3]Claimant states he would work with the Fund to repay the lien if the award were affirmed. Employer replies that, because it paid benefits pursuant to the administrative law judge's decision, any repayment to the Fund must come from claimant.

[4]Employer does not challenge the administrative law judge's finding that claimant was totally disabled from April 22 to June 27, 2006.

(1987), so long as the job is necessary and the claimant is capable of performing it. *Diosdado v. Newpark Shipbuilding & Repair Inc.*, 31 BRBS 70 (1997). In order for such a job to constitute suitable alternate employment, however, the job must be actually available to the claimant. *See Mendez v. National Steel & Shipbuilding Co.*, 21 BRBS 22 (1988); *see generally Norfolk Shipbuilding & Drydock Corp. v. Hord*, 193 F.3d 797, 33 BRBS 170(CRT) (4th Cir. 1999).

In this case, the administrative law judge found that employer's offer of a van driver job did not establish suitable alternate employment because employer was unable to provide assurance that on any given day it would actually have been available to claimant.[5] Contrary to employer's assertion, substantial evidence supports this finding. *See generally Tann*, 841 F.2d 540, 21 BRBS 10(CRT). The administrative law judge rationally credited the testimony of claimant and Mr. Green, a longshoreman at Tartan Terminals, that the reality was that claimant could not obtain a van driver job because "it is not industry practice to hire non-permanent employees [such as claimant] in van driver positions, primarily because of seniority issues." Decision and Order at 14-15. Claimant testified that, "[m]y seniority wouldn't allow [me to get a van driver's position on the waterfront]. I mean, that's considered one of the most premier jobs, is a van driving job. You have to have very high seniority in that particular company to get it. Nobody coming from another company could possibly get that job." Hr. Tr. at 47. Mr. Green testified that claimant would not be eligible for a van driver job with employer because it is industry practice for the employees with the most seniority to take the "gravier" jobs, and as a non-permanent employee with employer, claimant has no seniority there. *Id*. at 104-105. Consequently, as it is supported by substantial evidence, we affirm the administrative law judge's finding that the van driver job was not realistically available to claimant and, therefore, does not constitute suitable alternate employment. *See Mendez*, 21 BRBS 22; *see generally Hord*, 193 F.3d 797, 33 BRBS 170(CRT).

[5]Claimant was offered a van driving job with employer in writing on May 1, 2008. EX 13. However, claimant's April 1, 2009, deposition testimony and a November 13, 2006, letter from claimant's attorney to claimant indicate that clamant was informed of the availability of van driver positions with employer as early as November 2006. EX 16; EX 94 at 18-20.

We also reject employer's assertion that the administrative law judge erred in finding that the June 20, 2007, labor market survey does not establish suitable alternate employment.[6] Although this survey accounted for Dr. Badro's restrictions limiting claimant to light-duty work, the administrative law judge found that it did not establish suitable alternate employment because it did not take into account claimant's testimony that excruciating pain prevented him from working more than a few hours at a time before he needed to lie down. Decision and Order at 15; EX 94 at 24, 29, 33-34; Hr. Tr. at 52-53. The administrative law judge found claimant's complaints of pain to be credible because they were consistent with the medical reports of Drs. Badro and Arrison,[7] and because claimant had to go to the emergency room due to abdominal pain the two days he worked answering phones at a car dealership.[8] Decision and Order at 10, 15. The administrative law judge rationally found claimant's complaints of pain to be credible, and the Board is not empowered to reweigh the evidence. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Thus, contrary to employer's contention, because the June 2007 labor market survey does not account for claimant's pain, the administrative law judge reasonably determined that the survey does not establish suitable alternate employment. *See Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991).

Employer further asserts that the administrative law judge's decision violates the APA because he did not resolve various inconsistencies in the record.[9] We reject the assertion of error. The APA requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all material issues of fact, law or discretion presented in the record." 5 U.S.C. §557(c)(3)(A). Thus, the administrative law judge must adequately detail the rationale behind his decision and

[6]The jobs listed in the June 20, 2007, labor market survey are: sales clerk; security guard; customer service representative; front desk clerk at a hotel. EX 54, 61, 64.

[7]Both Drs. Badro and Arrison noted that claimant consistently complained of abdominal pain. Dr. Arrison specifically stated that claimant's complaints of pain were credible. CX 1 at 16.

[8]A letter from MacDaddy's car dealership notes that claimant worked on November 12, 2007, and November 14, 2007, answering phones and that on both days he left early to go to the emergency room due to abdominal pain. EX 107.

[9]Specifically, employer asserts that the administrative law judge did not resolve inconsistencies regarding the dates and locations of claimant's travels and vacations, whether claimant was taking his pain medication as prescribed, whether he informed the counselor of his prior arrest record, and whether he refused to provide a urine sample to a treating physician.

specify the evidence upon which he relies. *See v. Washington Metropolitan Area Transit Authority*, 36 F.3d 375, 28 BRBS 96(CRT) (4th Cir. 1994). In this case, the administrative law judge thoroughly set out the evidence of record, including evidence cited on appeal by employer. *See* Decision and Order at 3-10. In his analysis, the administrative law judge stated the relevant evidence on which he relied for his findings of fact. His failure to discuss the inconsistencies cited by employer does not detract from his well-reasoned conclusions that are supported by substantial evidence. *See Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996). We thus affirm the administrative law judge's award of temporary total disability benefits.

Employer additionally contends that the administrative law judge erred in awarding future medical care by Dr. Arrison. Specifically, employer asserts that the issue was not properly before the administrative law judge and that neither employer nor the OWCP authorized claimant's treatment with Dr. Arrison.

The Act's regulations afford an administrative law judge the discretion to address a new issue. *See* 20 C.F.R. §702.336(b); *Cornell University v. Velez*, 856 F.2d 402, 21 BRBS 155(CRT) (1st Cir. 1988). Section 702.336(b) permits the administrative law judge to consider "[a]t any time prior to the filing of the compensation order in the case," any new issue upon his own motion, but requires that he give the parties "not less than 10 days' notice of the hearing on such new issue." *See Velez*, 856 F.2d 402, 21 BRBS 155(CRT); *Ramirez v. Sea-land Services, Inc.*, 33 BRBS 41 (1999).

In this case, claimant first requested that he be awarded future medical treatment with Dr. Arrison in his September 19, 2010, post-hearing brief. Cl. Post-Hr. Br. at 13. Employer filed its post-hearing brief prior to claimant's request and addressed only the issue of temporary total disability. The administrative law judge did not notify employer that a new issue would be addressed in his decision. Because, as will be discussed below, this case must be remanded for further consideration of whether a proper and timely lien was filed, we instruct the administrative law judge to give employer reasonable notice and opportunity to respond to this issue pursuant to Section 702.336.[10] *See Ferrari v. San Francisco Stevedoring Co.*, 34 BRBS 78 (2000); *Ramirez v. Sea-Land Services, Inc.*, 33 BRBS 41 (1999).

[10]Employer additionally asserts that Dr. Arrison was not authorized to treat claimant. Employer may raise this issue before the administrative law judge on remand.

We summarize here the applicable law. Employer's liability for a claimant's medical treatment is governed by Section 7 of the Act. 33 U.S.C. §907. A claimant is entitled to his initial free choice of physician; thereafter if a claimant wishes to change physicians, he must seek written approval from the employer, the carrier, or the district director. 33 U.S.C. §907(b), (c); *Jackson v. Universal Maritime Services Corp.*, 31 BRBS 103 (1997) (Brown, J., concurring); *Hunt v. Newport News Shipbuilding & Dry Dock Co.*, 28 BRBS 364, *aff'd mem.*, 61 F.3d 900 (4th Cir. 1995); 20 C.F.R. §702.406. An employer need not consent to a change if it did not refuse treatment from authorized physicians.[11] *Hunt*, 28 BRBS 364. The determination of whether a doctor is claimant's initial free choice of physician rests on the findings of fact of the administrative law judge. *See generally Weikert v. Universal Maritime Service Corp*., 36 BRBS 38 (2002); *Sanders v. Marine Terminals Corp*., 31 BRBS 19 (1997) (Brown, J., concurring). An employer must consent to a change of physician where the claimant has been referred by his treating physician to a specialist skilled in treating the claimant's injury. *See generally Armfield v. Shell Offshore, Inc.*, 25 BRBS 303 (1992)(Smith, J., dissenting on other grounds); *Senegal v. Strachan Shipping Co.*, 21 BRBS 8 (1988); 20 C.F.R. §702.406(a). The administrative law judge does not have authority to authorize a change in physician pursuant to Section 702.406; his authority is limited to a determination of whether employer has lawfully denied claimant's request. That determination will be made on remand after the parties have fully argued the issue and the administrative law judge has made factual findings which support his determination. *Jackson*, 31 BRBS 103; *McCurley v. Kiewest Co.*, 22 BRBS 115 (1989).

We next address the Fund's appeal of the administrative law judge's denial of its motion to intervene. The relevant facts follow.

On November 18, 2010, the administrative law judge issued his decision and order awarding benefits to claimant, to be paid by employer. In that decision, the administrative law judge found that the Fund "is not a party to this case," and "never filed an application for a lien, pursuant to the criteria set forth in section 702.162. Additionally, no evidence was offered to establish that the [Fund] is a qualifying trust fund under [S]ection 17. Because these requirements were not met, no enforceable lien has been established." Decision and Order at 3 n.3 (citations omitted).

[11]The Act and regulations state that consent "shall be given in cases where an employee's initial choice was not of a specialist whose services are necessary for, and appropriate to, the proper care and treatment of the compensable injury or disease." 20 C.F.R. §702.406. In all other cases, "consent may be given upon a showing of good cause for change" or where the district director finds a change "necessary or desirable." *Id.*; 33 U.S.C. §907(b); *see also* 20 C.F.R. §702.407(c).

On November 30, 2010, two days after the administrative law judge's decision was issued, the Fund filed an emergency motion to intervene before the administrative law judge seeking to have its lien against any benefits awarded to claimant protected. The administrative law judge issued an Order to Comment on January 19, 2011, and the parties responded. The Fund argued that it properly notified the OWCP of its lien which should be protected under 20 C.F.R. §702.162. Employer stated that it complied with the administrative law judge's November 18, 2010, Decision and Order and paid claimant, and therefore, there was no compensation due against which to apply the Fund's lien. Claimant responded that he had reserved funds so that he could satisfy the lien if he were ordered to do so. The administrative law judge denied the Fund's motion to intervene on February 4, 2011, finding that the issue had been resolved because "[c]laimant stated that he would make separate arrangements with the Fund to pay the lien back." February 4, 2011, Order at 2. The Fund appeals the denial of its motion, and the Director, OWCP, responds, urging the Board to vacate the denial and remand for further consideration.

The Fund argues that the administrative law judge erred in denying its motion to intervene because it "properly filed a lien in accordance with applicable federal law," and the administrative law judge erred in relying on claimant's unsecured word that he would repay the Fund to find the issue resolved. The Director asserts that the administrative law judge failed to explain how the Fund's lien application fails to comply with Section 702.162, and that remand is required as a result. We agree with the Director.

Section 17 of the Act states, in relevant part, that where a trust fund established pursuant to a collective bargaining agreement has paid disability benefits to an employee "which the employee is legally obligated to repay by reason of his entitlement to compensation under this chapter or under a settlement, the Secretary shall authorize a lien on such compensation in favor of the trust fund for the amount of such payments." 33 U.S.C. §917. Section 702.162, the implementing regulation, addresses the steps such a trust fund must take to receive authorization from the Secretary. These steps are:

> (b)(1) [file an application with OWCP, including] "a certified statement by an authorized official of the trust fund that:
>
> > (i) The trust fund is entitled to a lien in its favor by reason of its payment of disability payments to a claimant-employee . . . ;
> >
> > (ii) The trust fund was created pursuant to a collective bargaining agreement covering the claimant-employee;
> >
> > (iii) The trust fund complies with section 302(c) of the Labor-Management Relations Act . . . ;

> (iv) The trust agreement contains a subrogation provision entitling the fund to reimbursement for disability benefits paid to the claimant-employee which is entitled to compensation under the Longshoreman's Act;
>
> (2) The statement shall also state the amount paid to the named claimant-employee and whether such disability benefit payments are continuing to be paid.
>
> * * *
>
> (f) If the administrative law judge issues a compensation order in favor of the claimant, such order shall establish a lien in favor of the trust fund if it is determined that the trust fund has satisfied all of the requirements of the Act and regulations.

20 C.F.R. §702.162(b)(1), (2), (f); *see generally M.K. [Kellstrom] v. California United Terminals*, 43 BRBS 1, *aff'd on recon.*, 43 BRBS 115 (2009). The administrative law judge found that the Fund failed to file a proper and timely lien in accordance with these regulatory criteria.

However, the administrative law judge did not explain why he found the Fund's lien application lacking, nor did he address the evidence submitted by the Fund supporting its position.[12] As the Director states, the Fund's cover letter dated December 19, 2007, together with the affidavit from Marshall Thompkins, and the letter from claimant acknowledging an indemnity agreement he signed with the Fund, appear to facially satisfy the requirements of 20 C.F.R. §702.162(b).[13] The administrative law

[12] In support of its motion, the Fund attached a copy of its December 19, 2007, cover letter to the OWCP, advising the OWCP of its lien in the instant case, and the November 30, 2010, affidavit of Marshall Thompkins, the claims manager for the Fund, which states, in relevant part: (1) the Fund is a multiemployer employee welfare benefit plan as defined in Section 3(1) of ERISA, 29 U.S.C. §1002(3)(1); (2) claimant applied for accident and sickness benefits from the Fund on December 12, 2007, related to an injury sustained on February 21, 2006, and at that time claimant signed an Indemnity Agreement wherein he agreed to repay the Fund in the event that he received a recovery related to the February 21, 2006 injury; (3) on December 7, 2007, Mr. Thompkins sent an application for a lien on behalf of the Fund with respect to claimant's February 21, 2006, accident, to OWCP; and, (4) claimant was paid $14, 300 in benefits.

[13]On January 18, 2010, claimant submitted a letter to the administrative law judge stating that he had to decline employer's settlement offer "because of an indemnity agreement I signed with STA-ILA Benefit Fund in 2007." Jan. 18, 2010, Letter.

judge's failure to address this evidence pursuant to Section 702.162 requires that we remand this case. Consequently, we vacate the administrative law judge's order denying the Fund's motion to intervene, and we remand this case for further consideration pursuant to the applicable regulation. If the administrative law judge grants the Fund's motion to intervene, he must make specific findings concerning its entitlement to an enforceable lien.

Accordingly, we vacate the administrative law judge's award of future medical benefits for treatment by Dr. Arrison and the Order Denial of Motion to Intervene, and the case is remanded for further proceedings consistent with this decision. In all other respects, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge