Section 7

Medical Benefits

DIGESTS

Introduction

Medical examinations by physicians chosen by employer cannot be classified as either compensation paid to employees or medical care necessary for treatment or the process of recovery; these examinations are merely a way an employer can double-check on the prognosis supplied by the treating physician chosen by the employee. Castro v. Maher Terminals, Inc., 710 F. Supp. 573 (D.N.J. 1989).

Since medical expenses are not paid in installments and are not within the definition of compensation under Section 2(12), Section 14(j) does not afford employer the right to reduce its liability for medical benefits under the administrative law judge's award by the amount of its voluntary disability payments. Aurelio v. Louisiana Stevedores, Inc., 22 BRBS 418 (1989), aff'd mem., No. 90-4135 (5th Cir. March 5, 1991).

Board held that claimant's counsel is entitled to attorney's fees for work on appeal because claimant established a work-related injury, making employer liable for claimant's medical care. Gencarelle v. General Dynamics Corp., 22 BRBS 170 (1989), aff'd, 892 F.2d 173, 23 BRBS 13 (CRT) (2d Cir. 1989).

A claim for medical benefits is never time-barred and when counsel establishes claimant's entitlement to medical expenses, he has successfully prosecuted the claim, thereby entitling him to attorney's fees. Gardner v. Railco Multi Construction Co., 19 BRBS 238 (1987), vacated on other grounds, 902 F.2d 71, 23 BRBS 69 (CRT) (D.C. Cir. 1990).

Board holds that claimant's counsel is entitled to attorney's fees under Section 28(b) where he establishes claimant's right to payment of past medical benefits and the right to additional future medical benefits. (Previous cases have stated this under Section 28(a) only.) This is so even though due to employer's large overpayment, claimant may not realize the award for many years. Geisler v. Continental Grain Co., 20 BRBS 35 (1987).

Two claimants who had no measurable hearing impairment under Section 8(c)(13) were denied disability benefits but were awarded medical benefits and a fee. The court rejected employer's argument that since claimants had no measurable impairment, they could not receive medical benefits. Nonetheless, the court reversed claimant Buckley's award of medical benefits, noting that there was no evidence of past expenses or of a need for future treatment; since the fee award was dependent on this award, it was also reversed. Ingalls Shipbuilding, Inc. v. Director, OWCP, [Baker], 991 F.2d 163, 27 BRBS 14 (CRT)(5th Cir. 1993).

The right to medical benefits is never time-barred; accordingly, a claimant may be entitled to medical benefits despite her failure to timely file her claim in compliance with Section 13 of the Act. Entitlement to medical benefits, however, is contingent upon a finding of a causal relationship between the injury and employment. The case is remanded for the administrative law judge to make the necessary findings. Wendler v. American National Red Cross, 23 BRBS 408 (1990) (McGranery, J., dissenting on other grounds). Accord Addison v. Ryan-Walsh Stevedoring Co., 22 BRBS 32 (1989); Weber v. Seattle Crescent Container Corp., 19 BRBS 146 (1986) (disability claim time-barred by Section 12).

The Board explains the basis for the holding that medical benefits are never time-barred. The Fifth Circuit, in *Hollis*, 460 F.2d 1108 (5th Cir. 1972), implicitly recognized that an employer has a continuing duty to furnish medical care with respect to work-related disabilities even if the disability claim is barred by Section 13. Moreover, the Supreme Court, in *Marshall v. Pletz*, 317 U.S. 383 (1943), held that payment of medical benefits is not "compensation" for purposes of tolling Section 13, and thus, the fact that an injury may not be compensated is not determinative of claimant's entitlement to medical benefits. *Siler v. Dillingham Ship Repair*, 28 BRBS 38 (1994) (decision on recon. *en banc*).

A claim for medical benefits under 33 U.S.C. §907 is never time-barred. Ryan v. Alaska Constructors, Inc., 24 BRBS 65 (1990).

The Ninth Circuit holds, in accordance with the Director's view, that interest may be assessed against employer on overdue medical expenses, whether reimbursement is owed to the provider or to the employee. (In effect, Pirozzi, 21 BRBS 294 is overruled). Hunt v. Director, OWCP, 999 F.2d 419, 27 BRBS 84 (CRT) (9th Cir. 1993), rev'g Bjazevich v. Marine Terminals Corp., 25 BRBS 240 (1991).

Board concludes that administrative law judge erred in awarding interest on the medical expenses claimant paid because there was no evidence in the record indicating that claimant had in fact made any payments to the health care providers or that the providers charged claimant interest on his unpaid bills. The Board also rejected the argument that health care providers are entitled to interest on claimant's unpaid medical bills. Pirozzi v. Todd Shipyards Corp., 21 BRBS 294 (1988) (Feirtag, J., dissenting in part).

In a case of first impression, the Board held that claimant is not entitled to a Section 14(f) assessment on medical benefits that were not timely paid. Interest cannot be assessed on past-due medical benefits that claimant has not paid himself. Caudill v. Sea Tac Alaska Shipbuilding, 22 BRBS 10 (1988), aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP, 8 F.3d 29 (9th Cir. 1993).

The Board vacated that portion of the district director's order which held employer liable for contested medical bills which were not part of the record before the administrative law judge, as he exceeded his authority in awarding payment of those contested bills. Claimant may request that the case be referred to an administrative law judge if she wishes to pursue payment of the bills. *Plappert v. Marine Corps Exchange,* 31 BRBS 13 (1997), *aff'd on recon. en banc*, 31 BRBS 109 (1997).

The Board affirms the administrative law judge's denial of claimant's request for reimbursement for expenses related to pain management treatment pursuant to 29 C.F.R. §18.6(d), for the duration of the time claimant refuses to undergo a medical examination ordered by the administrative law judge. The Board notes that this action is not inconsistent with Section 7(d)(4), which addresses only the suspension of compensation, or Section 27(b) dealing with sanctionable conduct. *Dodd v. Crown Central Petroleum Corp.*, 36 BRBS 85 (2002).

The Board held that the administrative law judge correctly determined, consistent with the last employer rule, that SSA is liable for all reasonable and necessary medical expenses related to claimant's work injuries. The Board however clarified that SSA cannot be held liable for any expenses related to medical treatment prior to the time it employed claimant. The Board remands the case for the administrative law judge to address which medical expenses are outstanding. *Lopez v. Stevedoring Services of America*, 39 BRBS 85 (2005).

Section 7(a) - Necessary Treatment

DIGESTS

The Board remanded the case to the administrative law judge for a determination of whether claimant's hearing loss is work-related so that claimant is entitled to medical benefits for a neck injury sustained during the course of a medical examination for the hearing loss. *Weber v. Seattle Crescent Container Corp.*, 19 BRBS 146 (1986).

Where relevant evidence establishes that claimant's psychological condition was caused, at least in part, by her work injury, and that she was treated, at least in part, for her work-related condition, claimant is entitled to benefits for this treatment. Board also holds that there is no evidence to support the administrative law judge's conclusion that the degree of claimant's pain is not sufficient to justify psychological services. The Board accordingly remands for the administrative law judge to enter an award of medical benefits for those expenses deemed reasonable and necessary for treatment of claimant's psychological condition. Kelley v. Bureau of Nat'l Affairs, 20 BRBS 169 (1988).

Board holds that administrative law judge erred in limiting employer's liability for medical expenses only to those incurred during the period of temporary total disability. In order for medical care, to be compensable, it must be appropriate for the injury, and claimant must establish that the medical expenses are related to the injury. See also 20 C.F.R. §702.402. Section 7 does not require that an injury be economically disabling in order for claimant to be entitled to medical expenses, but requires only that the injury be work-related. Ballesteros v. Willamette Western Corp., 20 BRBS 184 (1988).

The Board affirms the administrative law judge's denial of medical benefits based on his finding that claimant's laminectomy was unnecessary. Board holds, however, that employer is liable for disability compensation following claimant's surgery. Claimant's conduct in seeking treatment and his choice of physician were not unreasonable and neither his conduct nor Dr. Goodall's treatment severed the causal connection between claimant's primary injury and his employment. Board remands for the administrative law judge to determine the nature and extent of claimant's post-operative disability. Wheeler v. Interocean Stevedoring, Inc., 21 BRBS 33 (1988).

Board held that if on remand the administrative law judge determines that claimant's chronic pain syndrome is causally related to his employment, he must consider claimant's entitlement to medical benefits for the treatment rendered by Dr. Ng. An injury need only be work-related in order for claimant to be entitled to medical benefits and need not be economically disabling. Frye v. Potomac Elec. Power Co., 21 BRBS 194 (1988).

The Board affirms administrative law judge's finding that claimant's back problems were the natural and unavoidable result of his 1977 work injury, and claimant is therefore entitled to medical benefits, even though his claim for disability benefits was untimely. A claim for medical benefits is never time-barred. Colburn v. General Dynamics Corp., 21 BRBS 219 (1988).

The Board vacated the administrative law judge's finding that claimant is not entitled to reimbursement for medical expenses for periodic monitoring of his lung condition. The Board reasoned that since two qualified physicians indicated that medical treatment is necessary for a work-related condition, claimant has established a prima facie case for compensable medical treatment. Romeike v. Kaiser Shipyards, 22 BRBS 57 (1989).

Board rejects employer's argument that it is not liable for medical services which claimant obtained without authorization and because they were necessitated by claimant's second accident. Board affirms administrative law judge's conclusion that claimant's disabling condition was caused by his work injury. James v. Pate Stevedoring Co., 22 BRBS 271 (1989).

A claimant is entitled to medical benefits for a work-related injury, in this case a psychological injury of five percent, even if that injury is not economically disabling. Cotton v. Newport News Shipbuilding & Dry Dock Co., 23 BRBS 380 (1990).

The Second Circuit reversed the administrative law judge’s denial of medical benefits for claimant’s psychiatric condition, as it reverses the administrative law judge’s finding that it is not related to the work injury. The court holds that the administrative law judge erred in failing to rely on the uncontradicted medical evidence of record and in substituting his judgment therefor by finding that claimant’s symptoms are merely subjective. *Pietrunti v. Director OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997).

Where the administrative law judge found, based on doctor's opinion, that claimant would be "better off" remaining with his family than being cared for in a nursing home, the administrative law judge properly held employer responsible for paying for home health care services. The administrative law judge also properly determined that employer was liable for costs of keeping claimant at home. Board also affirms the administrative law judge's conclusion that employer must reimburse claimant's wife for home health care services because there is no evidence that parties' informal agreement, holding employer liable for only 8 hours per day of case, was approved by a deputy commissioner or administrative law judge. Falcone v. General Dynamics Corp., 21 BRBS 145 (1988).

Where claimant was severely injured in a work accident and all medical personnel who evaluated him recommended 24-hour supervision for his safety, the Board held that the administrative law judge erred in holding employer liable for less than 24 hours of paid care per day. The Board held that, while claimant was not in need of 24 hours of paid *professional* care each day, the recommendation required that employer pay claimant's family, albeit at a reduced rate, for their time in caring for claimant for the remainder of the 24 hours each day; the administrative law judge should not have required them to care for claimant for free. Thus, when it is uncontradicted that claimant needs 24 hours of care each day, the Board held employer liable for such care. Further, employer's liability commences after the request for such care was made, not merely upon discharge from the hospital. *Carroll v. M. Cutter Co., Inc.*, 37 BRBS 134 (2003) (Smith, J., concurring and dissenting), *aff'd on recon. en banc,* 38 BRBS 53 (2004) (Dolder, C.J., and Smith, J., dissenting), *aff'd,* 458 F.3d 991, 40 BRBS 53 (CRT) (9th Cir. 2006).

On reconsideration *en banc*, the Board affirmed its decision that the issue before it was a legal issue and that the administrative law judge erred in disregarding the undisputed evidence that claimant is in need of 24 hours of supervision per day. Because the evidence is undisputed and because Section 7(a) mandates that employer's liability for medical care is to be based on the care necessitated by the injury, the Board held that employer is liable for 24 hours per day of attendant care. *Carroll v. M. Cutter Co., Inc.*, 38 BRBS 53 (2004) (*en banc*) (Dolder, C.J., and Smith, J., dissenting), *aff'g* 37 BRBS 134 (2003) (Smith, J., concurring and dissenting), *aff'd,* 458 F.3d 991, 40 BRBS 53 (CRT) (9th Cir. 2006).

The Ninth Circuit affirmed the Board's interpretation of Section 7(a), which bases employer's liability for attendant care exclusively on a determination of the care required by the injury. Thus, the court affirmed the Board's holding as a matter of law that where it is undisputed that claimant needs 24-hour attendant care, Section 7(a) expressly mandates that employer is liable for that required care. *M. Cutter Co., Inc. v. Carroll,* 458 F.3d 991, 40 BRBS 53(CRT) (9th Cir. 2006), *aff'g* 37 BRBS 134 (2003) (Smith, J., dissenting in part), *aff'd on recon. en banc,* 38 BRBS 53 (2004) (Dolder and Smith, JJ., dissenting).

The Board affirms the administrative law judge's finding that modifications to claimant's house necessitated by his disability, including ramps, widened doorways, handicapped-accessible plumbing fixtures, etc., are covered under Section 7. Dupre v. Cape Romain Contractors, Inc., 23 BRBS 86 (1989).

An administrative law judge must consider the proximity of a physician's office to claimant's residence in determining whether claimant's change of treating physician is reasonable, as travel expenses incurred for medical purposes under Section 7 are recoverable. (Here, claimant's physician was more than 300 miles from claimant's residence). Welch v. Pennzoil Co., 23 BRBS 395 (1990).

The Board affirmed the administrative law judge's order directing employer to pay for

claimant's work-related surgical fusion at C6-7 as the administrative law judge rationally found the procedure to be reasonable and necessary. The Board distinguished McCurley, 22 BRBS 115 (1989), on the grounds that claimant has requested authorization from employer for a single medical procedure, which was denied, whereas in McCurley, the claimant sought ongoing, open-ended, non-specific treatment at a specific health care facility. Caudill v. Sea Tac Alaska Shipbuilding, 25 BRBS 92 (1991), aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP, 8 F.3d 29 (1993).

The Board affirms the denial of medical treatment as the administrative law judge rationally concluded that claimant's work-related back condition had resolved and that subsequent treatment was not for the work injury. *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).

Two claimants who had no measurable hearing impairment under Section 8(c)(13) were denied disability benefits but were awarded medical benefits and a fee. The court rejected employer's argument that since claimants had no measurable impairment, they could not receive medical benefits. Nonetheless, the court reversed claimant Buckley's award of medical benefits, noting that there was no evidence of past expenses or of a need for future treatment; since the fee award was dependent on this award, it was also reversed. With regard to claimant Baker, the court remanded for findings regarding the necessity of medical treatment, noting that one doctor recommended annual evaluations and stated claimant was "a candidate for amplification" but another found that a hearing aid would not help him. The administrative law judge was also directed on remand to consider the amount of the fee in terms of claimant's limited success. Ingalls Shipbuilding, Inc. v. Director, OWCP, [Baker], 991 F.2d 163, 27 BRBS 14 (CRT)(5th Cir. 1993).

Inasmuch as claimant has a work-related hearing loss in his right ear, claimant is eligible for medical benefits under Section 7 even though claimant may have no measurable work-related impairment under the AMA *Guides*. In order to be entitled to medical benefits under Section 7, claimant must provide an adequate evidentiary basis sufficient to support the award such as past expenses incurred or evidence of necessary treatment in the future. In the instant case, the Board affirmed, as supported by substantial evidence, the administrative law judge's determination that since the basis for recommending the hearing device is to compensate for the hearing loss of the left ear and that condition occurred as a result of an intervening cause wholly unrelated to any work-related hearing loss, employer could not be held liable for that proposed treatment. *Davison v. Bender Shipbuilding & Repair Co., Inc.*, 30 BRBS 45 (1996).

In order to be entitled to medical benefits, a claimant need only establish he sustained a work-related injury. A claimant need not have a ratable impairment under the AMA *Guides* to be entitled to medical benefits, as application of the AMA *Guides* is limited to claims for disability benefits under Section 8. Claimant herein sought only medical benefits after he sustained a non-ratable work-related hearing loss, and the Board affirmed the administrative law judge's determination that he is eligible for medical benefits, if they are necessary for his injury. The Board distinguishes this case from *Metro-North Commuter R.R. v. Buckley*, 521 U.S. 424 (1997), which is a FELA case. *Weikert v. Universal Maritime Service Corp.*, 36 BRBS 38 (2002).

While active supervision of a claimant's medical care is performed by the Secretary of Labor and her delegates, the district directors, the Board reiterated that there are some medical issues which remain in the domain of the administrative law judge: specifically, those issues which involve factual disputes as opposed to those which are purely discretionary. In this case, the parties disputed claimant's entitlement to hearing aids for his non-ratable work-related hearing loss; however, the administrative law judge did not address the issue but instead remanded the case for the district director to do so. The Board vacated the administrative law judge's order of remand, and remanded the case to the administrative law judge for resolution of the issue of whether hearing aids are necessary and reasonable treatment for claimant's hearing loss, as such as factual issues for the administrative law judge. The Board rejected employer's assertion that claimant's alleged non-compliance with state law affects his entitlement under the Act. *Weikert v. Universal Maritime Service Corp.*, 36 BRBS 38 (2002).

The Board affirms the denial of medical benefits as the administrative law judge rationally found that the doctor's treatment was duplicative of the treatment claimant was receiving from other doctors and therefore was unnecessary. *Hunt v. Newport News Shipbuilding & Dry Dock Co.*, 28 BRBS 364 (1994), *aff'd mem.,* 61 F.3d 900 (4th Cir. 1995).

The Board affirmed the administrative law judge's denial, as unreasonable and unnecessary, the "medical treatment" allegedly administered by Dr. Vogel as his findings are supported by substantial evidence. This evidence, as indicated by the Administrative law judge in his decision, includes the facts that: claimant saw Dr. Vogel with regard to an unrelated state court claim; that the record contained no treatment records by Dr. Vogel or any indication that claimant went to Dr. Vogel for continued treatment of his work-related condition; and that claimant was referred to Dr. Vogel by his attorney and not by any treating physician. *Ezell v. Direct Labor, Inc.*, 37 BRBS 11 (2003).

Claimant is not afforded the benefit of a presumption of reasonableness of treatment under Section 7 by virtue of Section 20(a) of the Act. Although neither Section 7 of the Act nor the regulations explicitly assigns the burden of proof, claimant is not relieved of the burden of proving the elements of her claim for medical benefits. *Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112, 114 (1996).

In determining the reasonableness of the costs of treatment claimant, a resident of Austin, Texas, procured in a pain center in Boston, the administrative law judge did not err by comparing the costs of the Boston treatment to that of similar treatment available in Houston, Texas. Although 20 C.F.R. §702.413 requires that a provider's fees are limited to prevailing community charges for similar care in the community in which the medical care is located, that regulation acts as a ceiling for compensable fees, and does not preclude the administrative law judge from awarding a lesser amount where comparable less expensive treatment was available to claimant locally. *Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112, 114 (1996).

While the proximity of the medical care to claimant's residence is a factor to be considered in determining the reasonableness of medical treatment, where competent care is available locally, claimant's medical expenses may reasonably be limited to those costs which would have been incurred had the treatment been provided locally. In the instant case, the administrative law judge compared treatment available at a local pain center in Houston with the treatment procured by claimant in Boston, and, after considering the treatment available, the professional accreditations and success rates, and the experience of each clinic's director, rationally determined that adequate comparable treatment was available locally at a lesser cost. *Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112, 114-115 (1996).

The administrative law judge rationally concluded that it was not reasonable for claimant to seek treatment with Dr. Vogel because of the considerable distance between claimant's residence in Houma, Louisiana, and Dr. Vogel's office, located in New Orleans, especially since other equally qualified physicians who were chosen by claimant, were in the Houma area. *Ezell v. Direct Labor, Inc.*, 37 BRBS 11 (2003).

The Board vacated the administrative law judge's denial of medical benefits and remanded the case to the administrative law judge to determine whether claimant is entitled to medical benefits for her work injury since there is evidence that may be sufficient to establish that she is undergoing treatment necessary for her work-related injury. Although the administrative law judge stated on reconsideration that there was no issue regarding medical benefits for him to decide because claimant presented no bills for payment, claimant's counsel asserted employer's responsibility for medical benefits and the administrative law judge should have addressed this issue. *Buckland v. Dep't of the Army/ NAF/CPO*, 32 BRBS 99 (1997).

The Board affirmed the administrative law judge's finding that employer is not liable for the treatment provided by Dr. Raffai, as the administrative law judge rationally found that claimant's work-related back condition had resolved prior to the treatment, and it was within the administrative law judge's discretion to find that Dr. Raffai's treatment was not necessary for claimant's work-related back condition. *Arnold v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9 (2001), *aff'd mem.,* 32 Fed. Appx. 126 (5th Cir. 2002)(table).

The First Circuit agreed with the Board's affirmance of the administrative law judge's general finding that claimant is entitled to medical benefits under Section 7(a), as the record establishes that claimant sustained an "injury" as defined by the Act. The parties, however, may litigate the propriety and reasonableness of any specific medical expenses. *Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004).

The Ninth Circuit holds that, although the employer is not required to pay for unreasonable and inappropriate treatment, when the patient is faced with two or more valid medical alternatives, it is the patient, in consultation with his own doctor, who has the right to choose his own course of treatment. The administrative law judge may not find that the course chosen by claimant is unreasonable or unwarranted if no doctor states that the treatment is unnecessary or unreasonable. In this case, the administrative law judge credited employer's examining physician over claimant's treating physician. The court vacated the administrative law judge's finding that proposed surgery is not necessary, based on the examining physician's testimony, as the treating physician's opinion is entitled to greater weight, and as employer's physician acknowledged that surgery was a judgment call. *Amos v. Director, OWCP*, 153 F.3d 1051 (1998), *amended*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir. 1999), *cert. denied*, 528 U.S. 809 (1999).

The Board affirmed the administrative law judge's finding that when presented with two valid options for treatment, the decision should be left with the claimant to choose between them, and employer is liable for the option she chooses. Claimant's doctor recommended surgery, employer's doctor stated surgery was not necessary and would be malpractice, and an independent examiner did not recommend surgery but said many doctors would find surgery a viable option for claimant's condition. The administrative law judge noted the credentials of the physicians and rationally found that employer is liable for claimant's choice of treatment. *Monta v. Navy Exchange Service Command*, 39 BRBS 104 (2005).

Board rejects employer's argument that Section 8(f) relief applies to medical expenses. The Special Fund may be held liable for medical expenses only under Section 44(j)(4) where the Secretary orders an independent medical examination or under Section 18(b) when employer defaults. *Stone v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 1 (1987).

The right to reimbursement of medical costs to a carrier providing non-occupational disease coverage (an intervenor) for a condition ultimately determined to be occupationally-related, is solely derivative of claimant's right to reimbursement of such expenses under Section 7. Section 7 provides the exclusive means of holding employer liable for medical benefits and contains no provisions granting non-occupational carriers a right to reimbursement. *Ozene v. Crescent Wharf & Warehouse Co.*, 19 BRBS 9 (1986).

Claimant has no standing to assert Medi-Cal's rights to reimbursement for medical services it provided to claimant. *Quintana v. Crescent Wharf & Warehouse Co.*, 18 BRBS 254 (1986), *modified on recon.*, 19 BRBS 52 (1986).

On reconsideration, the Board modified its Decision and Order of May 5, 1986, holding that the administrative law judge erred in not allowing Medi-Cal to intervene to obtain reimbursement of medical expenses. An insurance carrier providing coverage for non-occupational injuries can intervene and recover amounts mistakenly paid out for injuries determined to be work-related where claimant is entitled to such expenses. The Board remands the case to the administrative law judge for a determination as to who should reimburse Medi-Cal. If employer has not yet paid claimant, employer must reimburse Medi-Cal, but if employer has paid claimant, claimant will reimburse Medi-Cal. *Quintana v. Crescent Wharf & Warehouse Co.*, 19 BRBS 52 (1986), *modifying on recon.* 18 BRBS 254 (1986).

The Board rejects claimant's argument that employer owes him for medical bills paid by his private insurers and the state of California for bills paid by Medi-Cal. Claimant may only recover amounts which he himself expended for medical treatment. *Nooner v. National Steel & Shipbuilding Co.,* 19 BRBS 43 (1986).

The Board held that a one-sentence “argument” which cites a single authority does not constitute adequate briefing of an issue raised on appeal, as the Board would have to extrapolate the argument and conclusion therefrom. Therefore, the Board held on reconsideration that the panel properly declined to address the issue in its decision. However, for the sake of clarification, the Board, *en banc*, stated that employer is liable to claimant for all medical expenses related to the injury paid by claimant and is liable for all medical expenses related to the injury paid by claimant’s private health insurer, provided the private insurer files a claim for reimbursement of same. *Plappert v. Marine Corps Exchange*, 31 BRBS 109 (1997), *aff’g on recon. en banc* 31 BRBS 13 (1997).

The Board held that the administrative law judge erred in concluding that, in general, medical expenses are not properly the subject of a Section 3(e) credit, but the error was harmless because the administrative law judge correctly recognized that the state's right to reimbursement for claimant's medical expenses is contingent upon claimant's right to medical benefits under the Longshore Act. The State of Washington is entitled to reimbursement from employer for claimant's medical benefits only if the administrative law judge finds on remand that claimant is entitled to medical benefits under the Act. *McDougall v. E. P. Paup Co.*, 21 BRBS 204 (1988), *aff'd and modified sub nom. E.P. Paup Co. v. Director, OWCP,* 999 F.2d 1341, 27 BRBS 41 (CRT) (9th Cir. 1993).

Sections 7(b), (c) - Choice of Physician

DIGESTS

Updated Citation - Roger's Terminal and Shipping Corp. v. Director, OWCP, 784 F.2d 687, 18 BRBS 79 (CRT) (5th Cir. 1986), cert. denied, 479 U.S. 826 (1986).

An employer was not required to consent to a change of physicians where claimant, who sustained a pulmonary injury and initially chose to see a physician who was not a pulmonary specialist, later decided to undergo treatment from a pulmonary specialist, because the initial physician sent claimant to other specialists skilled in treating pulmonary injuries, and thus the initial physician provided the care of a specialist whose services are necessary for the proper care and treatment of the compensable injury pursuant to Section 7(b) and 20 C.F.R. §702.406(a). Senegal v. Strachan Shipping Co., 21 BRBS 8 (1988).

Section 7(b) and its accompanying regulation, 20 C.F.R. §702.407, address the authority of the Secretary and the deputy commissioners to oversee an injured employee's medical care. The provisions, do not, however, address the issue of payment or reimbursement, which is governed by Section 7(d). *Anderson v. Todd Shipyards Corp*., 22 BRBS 20 (1989).

The Board holds that the administrative law judge erred in setting forth specific medical care to be provided to claimant by employer. The administrative law judge's actions violated Section 7(b) of the Act and Sections 702.406 and 702.407 of the regulations, which authorize the Secretary and his designee, the deputy commissioner, to oversee the provision of health care. McCurley v. Kiewest Co., 22 BRBS 115 (1989).

The Board holds that where the employer authorized treatment for the initial physician, who subsequently retired and turned his practice over to another physician, claimant need not seek authorization for treatment with the new physician. *Maguire v. Todd Pacific Shipyards Corp.,* 25 BRBS 299 (1992).

The Board holds that where claimant’s treating physician became unavailable due to his leaving private practice, claimant was not required to obtain approval from employer or the district director before treating with a new physician of his choosing. Good cause for the change is established under these facts, pursuant to 20 C.F.R. §702.206(a). *Lynch v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 29 (2005).

The Board affirms the administrative law judge's finding that claimant did not need to seek authorization for a change in physician where the initial physician referred claimant to the appropriate specialist. *Armfield v. Shell Offshore, Inc.*, 25 BRBS 303 (1992) (Smith, J., dissenting on other grounds).

The Board rejects claimant's contention that she was not permitted to select her own

physician because the nature of her injury required that employer immediately select one for her. Section 7(b) and 20 C.F.R. §702.405 permitting employer to select a physician contemplate serve injuries such as unconsciousness or other incapacity preventing claimant from making a selection. In this case claimant was not so incapacitated; employer suggested a doctor when claimant's initial choice was unavailable and claimant treated with this doctor for two years. Thus, he was her initial free choice. Moreover, employer was not required to consent to a change in physician as employer did not refuse to authorize continuing treatment from this doctor. *Hunt v. Newport News Shipbuilding & Dry Dock Co.*, 28 BRBS 364 (1994), *aff'd mem.,* 61 F.3d 900 (4th Cir. 1995).

The Board rejects the Director's contention that only the district directors, by delegation of the Secretary, have the authority to adjudicate the appropriateness of medical care, in this case consisting of housekeeping assistance. The Board holds that a claim for medical benefits that raises disputed factual issues such as the need for specific care or treatment for a work-related injury must be referred to an administrative law judge for resolution of the disputed factual issues in accordance with Section 19(d) of the Act and the APA. This interpretation is supported by the regulations at 20 C.F.R. §§702.315, 702.316. The Board distinguishes its holding in *Toyer*, 28 BRBS 347, as that case involved solely a discretionary determination under Section 7(d)(2). *Sanders v. Marine Terminals Corp.*, 31 BRBS 19 (1997)(Brown, J., concurring).

The Board holds that pursuant to Section 7(b) and Sections 702.406(b) and 702.407(b), (c), only the district director, and not the administrative law judge, has the authority to change claimant's treating physician at the request of employer, if the district director determines that such change is necessary or desirable in the interest of the employee. The Board holds that the language of the statute is discretionary, as in *Toyer*, 28 BRBS 347, and therefore there is no role for the administrative law judge to play in this determination. *Sanders*, 31 BRBS 19, is distinguished. In this case, however, the district director failed to sufficiently explain his reasons for granting employer's request and changing claimant's physician; therefore, the Board vacated the decision and remanded the case to the district director for further consideration. *Jackson v. Universal Maritime Service Corp.*, 31 BRBS 103 (1997) (Brown, J., concurring).

The Board reversed the administrative law judge's award of medical benefits for non-chiropractic care provided by a chiropractor as services, in this case biofeedback treatment and physical therapy, other than spinal manipulation to correct a subluxation provided by a chiropractor upon referral from a treating doctor are not reimbursable based on the plain language of 20 C.F.R. §702.404 that a chiropractor's "only" reimbursable service is "limited" to treatment consisting of manual spinal manipulation to correct a subluxation shown by x-ray or clinical findings. *Bang v. Ingalls Shipbuilding, Inc.*, 32 BRBS 183 (1998).

The Board holds that, notwithstanding claimant's right to choose a new treating physician, pursuant to Section 7(b) and 20 C.F.R. §§702.406(b), 702.407(b), (c), the district director had the authority to address employer's objection to claimant's choice of physician on the ground that he is not a specialist in treating spinal injuries. Inasmuch as the claims examiner's conclusion that claimant's chosen physician is not a spine specialist was a disputed question of fact, the administrative law judge had the authority to make findings on this issue. *Lynch v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 29 (2005).

The administrative law judge's decision must be based on the evidence of record. The administrative law judge purported to rely on the "testimony" of claimant's counsel at the hearing to find that claimant's chosen physician treats spinal injuries. Claimant's counsel was a not a witness, and his statements at the hearing or in briefs are not part of the evidentiary record. The Board therefore vacates the administrative law judge's finding that claimant's chosen physician was an appropriate spine specialist as it is not supported by substantial evidence. As claimant had ample opportunity to put in evidence on this issue, the Board does not remand the case to the administrative law judge. The case is remanded to the district director to issue an order addressing and resolving the parties' contentions regarding claimant's chosen physician consistent with the Act and regulations governing medical issues. *Lynch v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 29 (2005).

The Board holds that claimants do not have a statutory right to select their own pharmacy or provider of prescriptions, as pharmacies are not included in the definition of "physician" contained in 20 C.F.R. §702.404, and thus are not encompassed within Section 7(b)'s right to choose a physician. *Potter, et al. v. Electric Boat Corp.*, 41 BRBS 69 (2007).

The Board holds that, pursuant to 20 C.F.R. §702.407(b), the district director, and not the administrative law judge, has the authority to address the choice of pharmacy issue raised by the parties, as the district director supervises the medical care of injured employees. The parties did not raise any factual issues requiring adjudication by an administrative law judge. *Potter, et al. v. Electric Boat Corp.*, 41 BRBS 69 (2007).

DIGESTS

Authorization/Refusal

NOTE: Page 7-9 of the Longshore Desk Book states that, for medical expenses to be compensable, an employee need not seek his employer's authorization of his medical treatment once the employer has unreasonably refused to provide treatment or to satisfy the employee's request for treatment. This standard is, however, incorrect: The employer's refusal need not be unreasonable for the employee to be released from the obligation of seeking his employer's authorization of medical treatment. See generally 33 U.S.C. §907(d)(1)(A). Accordingly, Betz, 14 BRBS 805 (1981), and other decisions setting forth the "unreasonable refusal" standard should not be cited in discussions of this authorization issue.

Updated Citations - Roger's Terminal and Shipping Corp. v. Director, OWCP, 784 F.2d 687, 18 BRBS 79 (CRT) (5th Cir. 1986), cert. denied, 479 U.S. 826 (1986).

Rucker v. Lawrence Mangum & Sons, Inc., 18 BRBS 74 (1986), rev'd on other grounds mem., 830 F.2d 1188 (D.C. Cir. 1987).

Administrative law judge denied claim for reimbursement of medical expenses because claimant failed to seek employer's authorization for the treatment. Board remands, however, because administrative failed to determine whether employer may have already refused further treatment and thus excusing claimant from seeking authorization. Marvin v. Marinette Marine Corp., 19 BRBS 60 (1986).

Board affirms administrative law judge's determination that decedent's failure to comply with the Section 7(d) requirement that claimant first request for authorization bars claimant's right to reimbursement of medical expenses as there is no evidence that employer had previously refused or neglected to provide treatment. Lustig v. Todd Shipyards Corp., 20 BRBS 207 (1988), aff'd in part and rev'd in part on other grounds sub nom. Lustig v. U.S. Dept of Labor, 881 F.2d 593, 22 BRBS 159 (CRT) (9th Cir. 1989).

Board rejects employer's argument that the administrative law judge erred in awarding claimant medical benefits where employer had informed claimant's authorized physician that it would not accept any further liability for claimant's medical treatment. Once employer refuses to provide treatment or to satisfy claimant's request for treatment, employer is liable for any treatment claimant subsequently procures on his own initiative which was necessary for treatment of the work injury. Pirozzi v. Todd Shipyards Corp., 21 BRBS 294 (1988) (Feirtag, J., dissenting on other grounds).

Board reiterates standard for compensable medical expenses: Although medical services must generally be authorized by the employer to be compensable, an employee is released from the obligation of seeking employer's authorization once the employer has refused to provide treatment or to satisfy the employee's request for treatment. In this situation, the employee need only establish that the unauthorized medical services were necessary for the treatment of his work injury for the services to be compensable. In this case, the Board affirmed the administrative law judge's determination that the treatment in question was not authorized based on the testimony of carrier's claims representative and that the laminectomy was not necessary based on the opinions of three doctors before and after the operation that surgery was unwarranted. Thus, the Board also affirmed the administrative law judge's ultimate denial of claimant's claim for the cost of the surgery. Wheeler v. Interocean Stevedoring, Inc., 21 BRBS 33 (1988).

Section 7(d) addresses the issue of payment for medical expenses already incurred. The issues of whether claimant requested authorization, whether employer refused the request and whether the treatment subsequently obtained was necessary, are factual issues for the administrative law judge to resolve. The Board affirms the finding that employer is liable for medical expenses as claimant requested authorization, employer refused to authorize the treatment, and the administrative law judge found the treatment necessary. *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989).

The Board remands the case for further findings where there is evidence, which, if credited, could establish that claimant sought, and employer refused, authorization to treat with a doctor. If so, claimant need not have sought authorization subsequently to treat with two other doctors, and claimant is entitled to reimbursement if the treatment was necessary. *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87 (1989).

Mere knowledge of medical treatment by an employer or carrier does not create an obligation to pay for it; claimant must first request treatment and obtain written authorization before a medical expense is compensable under Section 7(d) and 20 C.F.R. §§702.405, 702.406 (1983) Letters from an insurance carrier requesting information about treatment do not constitute authorization. If an employer or carrier refuses a written request for authorization to seek treatment, such refusal can be reviewed by DOL. If an employer unreasonably delays in acting on a request, it may be deemed a constructive denial, depending on the circumstances. Neither situation, however, is presented in this case, as claimant never requested authorization. Parklands, Inc. v. Director, OWCP, 877 F.2d 1030, 22 BRBS 57 (CRT) (D.C. Cir. 1989).

Board rejects employer's argument that it is not liable for medical services which claimant obtained without authorization and because they were necessitated by claimant's second accident. Board affirms administrative law judge's conclusion that employer constructively refused to provide treatment after Dr. Young released claimant to return to work. James v. Pate Stevedoring Co., 22 BRBS 271 (1989).

In order to be entitled to medical expenses, claimant must first request employer's authorization. If claimant's request for authorization is refused by employer, claimant may still establish entitlement to medical treatment at employer's expense if he establishes that the treatment subsequently procured on his own initiative was necessary for treatment of the injury. The administrative law judge's denial of past medical expenses is affirmed, as the claimants failed to seek prior authorization. Ranks v. Bath Iron Works Corp., 22 BRBS 301 (1989).

The Board held that the administrative law judge made a rational determination that employer constructively refused claimant's request for authorization of medical treatment by unreasonable delay. Employer was aware that claimant was in severe pain, but failed to respond to claimant's request for at least one month. Employer thus is liable for reasonable and necessary medical care. *Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112, 113 (1996).

Based on his credibility determinations, the administrative law judge rationally found that the letter sent by claimant's doctor to employer's carrier seeking authorization for a two-day multidisciplinary evaluation at St. Mary's Medical Center did not exclude unlisted procedures such as a discogram. In addition, the administrative law judge's finding that the authorization provided by employer's carrier included authorization for claimant's discogram was also rational. Consequently, the Board affirmed the administrative law judge's conclusion that St. Mary's, requested, and employer provided, authorization for claimant's discogram, as that determination is rational and supported by substantial evidence. Moreover, the Board affirmed the administrative law judge's finding that claimant's discogram was a reasonable and necessary procedure, based on his rational credibility determinations. Thus, the Board affirmed the administrative law judge's determination that employer was liable for the cost of the discogram and the treatment of claimant's discitis. *Pozos v. Army & Air Force Exchange Service* , 31 BRBS 173 (1997).

The Board affirmed the administrative law judge's denial of reimbursement for the cost of the initial visit with Dr. Jackson, as that visit occurred prior to the request for authorization for treatment. Because the denial of those medical expenses was affirmed, the Board also affirmed the denial of reimbursement for travel to Dr. Jackson's office on that occasion. The medical expenses incurred after the request for authorization of treatment, which were awarded by the administrative law judge, were affirmed. *Galle v. Ingalls Shipbuilding, Inc.*, 33 BRBS 141 (1999), *aff'd sub nom. Galle v. Director, OWCP,* 246 F.3d 440, 35 BRBS 17(CRT)(5th Cir. 2001), *cert. denied*, 122 S.Ct. 479 (2001).

In this case, where claimant sought treatment with Dr. Vogel subsequent to his treatment by Dr. Walker, the administrative law judge denied claimant's request for reimbursement for the treatment provided by Dr. Vogel. The Board vacated the administrative law judge's denial and remanded the case for reconsideration, as the administrative law judge did not determine whether Dr. Walker was claimant's or employer's physician, and Dr. Walker's suggestion that claimant be treated elsewhere conflicted with the administrative law judge's finding that Dr. Walker did not refuse to treat claimant. Moreover, the administrative law judge did not consider evidence in the record which, if credited, could support a finding that claimant did seek authorization from employer for treatment by Dr. Vogel, and lastly, the administrative law judge did not consider whether Dr. Vogel is a specialist, and thus, whether employer is required to consent to Dr. Vogel's treatment. *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999).

In affirming the finding that the responsible employer is liable for medical benefits, the Board rejected SSA's contention that claimant was required to request separate authorization from it in this case, as claimant sought and received prior authorization for treatment not only from the employers who were on the risk at the time, but, more importantly, from the district director. The Board observed that the district director's involvement in this case, coupled with the fact that under Section 7(a), all compensable medical expenses must be reasonable and necessary to treat the work-related injury sufficiently protects the responsible employer's interests with regard to its liability for the medical treatment. *Lopez v. Stevedoring Services of America*, 39 BRBS 85 (2005).

Employer was aware of decedent's stroke, and instructed his wife to seek medical coverage from a private health insurer. The Board thus affirms the administrative law judge's finding that employer refused to authorize treatment, and therefore that employer is liable for the medical treatment incurred. *Bazor* v. *Boomtown Belle Casino*, 35 BRBS 121 (2001), *rev'd on other grounds,* 313 F.3d 300, 36 BRBS 79(CRT) (5th Cir. 2002), *cert. denied,* 540 U.S. 814 (2003).

In an order issued subsequent to his initial decision, the administrative law judge granted employer's motion for reconsideration and vacated his earlier award of medical benefits, finding that claimant failed to comply with Section 7(d). On appeal, the Board vacated the administrative law judge's order, holding that Section 7(d) concerns issues of fact and law that are separate and distinct from the request for medical benefits itself, and thus, the issue of Section 7(d) compliance is not raised automatically by a claim for medical benefits. As employer did not raise the issue of Section 7(d) compliance at the hearing below, the Board held that the administrative law judge erred in considering the issue after issuing his initial decision without providing claimant the opportunity to submit evidence. Thus, the Board remanded the case for the administrative law judge to re-open the record in order to reconsider the issue of Section 7(d) compliance. *Ferrari v. San Francisco Stevedoring Co.*, 34 BRBS 78 (2000).

Physician's Report of Treatment

The Board defers to the Director's position and holds that the Director, through her delegates, the district directors, has the sole authority to consider whether the failure to timely file a first report of treatment should be excused in the interest of justice. Section 7(d)(2) refers to the "Secretary's" authority, and the regulation at 20 C.F.R. §702.422(c), which formerly referred to the district director or the administrative law judge, now refers only to the Director. The Board remands the case to the district director for findings on this issue. The district director's decision will be directly appealable to the Board. The Board notes the potential bifurcation problems with its holding. *Toyer v. Bethlehem Steel Corp.*, 28 BRBS 347 (1994) (McGranery, J., dissenting). *See also Krohn v. Ingalls Shipbuilding, Inc.*, 29 BRBS 72 (1994) (McGranery, J., dissenting); *Ferrari v. San Francisco Stevedoring Co.,* 34 BRBS 78 (2000).

The decision regarding whether or not to excuse the failure to file a first report of treatment is within the administrative law judge's discretion. Furthermore, employer's filing of a notice of controversion does not excuse the failure of the employee's physician to properly file the required reports. Force v. Kaiser Aluminum & Chemical Corp., 23 BRBS 1 (1989), aff'd in part and rev'd in part on other grounds sub nom. Force v. Director, OWCP, 938 F.2d 981, 25 BRBS 13 (CRT) (9th Cir. 1991).

The Board affirms the administrative law judge's decision to excuse a physician's failure to file a first report of treatment, as employer offered no evidence that the treatment was unnecessary or unrelated to the work injury. Employer's mere mention of potential financial hardship given its inability to monitor the treatment is insufficient to establish an abuse of discretion on the part of the administrative law judge. *Maguire v. Todd Pacific Shipyards Corp.*, 25 BRBS 299 (1992).

The Board affirms the administrative law judge's decision to excuse a physician's failure to timely file a first report of treatment, as employer offered no evidence that the treatment was unnecessary or unrelated to the work injury. Employer argument that it was prejudiced by the delay because it had no opportunity to authorize or provide a physician or to monitor the treatment claimant received is rejected. *Armfield v. Shell Offshore, Inc.*, 25 BRBS 303 (1992) (Smith, J., dissenting on other grounds).

The Board affirmed the district director’s determination that claimant’s physician’s failure to file a first report of treatment within 10 days of the initial treatment should be excused in the interest of justice. The district director based his decision on a letter in which claimant voiced her confusion on how to proceed with advising her medical providers. Moreover, the Board noted that the facts as found by the administrative law judge indicate that claimant and one of her doctors notified employer’s claims examiners of her condition and requisite treatment in December 1992. Therefore, the Board held that employer failed to show that the district director abused his discretion in excusing the delayed reporting. *Plappert v. Marine Corps Exchange,* 31 BRBS 13 (1997), *aff’d on recon. en banc,* 31 BRBS 109 (1997).

The Board remands the case to the district director for a determination as to whether claimant's doctor timely filed a first report of injury under Section 7(d)(2). The Board notes that the report must be furnished "within ten days following the first treatment" and does not apply to the first treatment after SSA came on the risk. *Lopez v. Stevedoring Services of America*, 39 BRBS 85 (2005).

There is no provision under the Act requiring that a private health insurer provide ongoing medical reports to the employer. In the instant case, the administrative law judge found that employer had knowledge of decedent's injury, and could have investigated the reasonableness of the services provided and charges therefor. *Bazor* v. *Boomtown Belle Casino*, 35 BRBS 121 (2001), *rev'd on other grounds,* 313 F.3d 300, 36 BRBS 79(CRT) (5th Cir. 2002), *cert. denied,* 540 U.S. 814 (2003).

Section 7(d)(3)

Where medical providers seeking reimbursement of medical expenses retained their own counsel and intervened in the claim for benefits, the Ninth Circuit determined they have no independent entitlement to medical benefits but do have a derivative right based on claimant's entitlement to recover medical benefits. Consequently, they can seek medical benefits under Section 7(d)(3), and if they do so, they are "person[s] seeking benefits" under Section 28(a) and they are entitled to an attorney's fee. Hunt v. Director, OWCP, 999 F.2d 419, 27 BRBS 84 (CRT) (9th Cir. 1993), rev'g Bjazevich v. Marine Terminals Corp., 25 BRBS 240 (1991).

Following *Hunt v. Director, OWCP*, 999 F.2d 419, 27 BRBS 84 (CRT)(9th Cir. 1993), the Board rejected employer's contention that the administrative law judge lacked jurisdiction to hear a claim brought by claimant's medical provider, St. Mary's Medical Center. As employer refused to pay for St. Mary's treatment of claimant for her discitis, which resulted from a discogram performed as a result of her work-related back condition, St. Mary's sought to recover claimant's medical benefits to the extent that the benefits were owed to the provider in satisfaction of unpaid bills, a right it had under Section 7(d)(3). *Pozos v. Army & Air Force Exchange Service*, 31 BRBS 173 (1997).

Explaining that it is bound by controlling law of the circuit in which the claim arises, the Board rejects employer's contention that the Ninth Circuit's decision in *Hunt v. Director, OWCP*, 999 F.2d 419, 27 BRBS 84(CRT) (9th Cir. 1993) is in error, and follows that precedent to hold that pursuant to the court's interpretation of Section 7(d)(3) claimant's medical provider is a "person seeking benefits" within the meaning of Section 28(a), entitling the provider's counsel to an attorney's fee payable by employer. *Buchanan v. International Transportation Services,* 31 BRBS 81 (1997).

The Board rejected Dr. Meyers' contention that the administrative law judge erred in failing to hold employer liable for his attorney's fee, holding that the instant case was distinguishable from *Hunt v. Director, OWCP*, 999 F.2d 419, 27 BRBS 84 (CRT)(9th Cir. 1993). Unlike the situation in *Hunt*, Dr. Meyers did not seek payment of benefits for his treatment of claimant; rather, he sought payment for his appearance at a deposition. As his action to seek payment for his time was not a derivative claim for medical benefits under Section 7, Dr. Meyers was not a "person seeking benefits" under Section 28 of the Act, and therefore, was not entitled to an attorney's fee payable by employer. *Duhagon v. Metropolitan Stevedore Co.*, 31 BRBS 98 (1997), *aff'd,* 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999).

Unreasonable Refusal to Submit to Treatment

Section 7(d)(4) contemplates an immediate remedy for an employer when a claimant unreasonably refuses to submit to medical examination or treatment; however, an employer must obtain an order authorizing it to suspend benefits before it takes such action. Accordingly, the Board holds that the administrative law judge erred in applying Section 7(d)(4) retroactively to May 1982 when employer first raised the issue of claimant's refusal to undergo surgery on October 1, 1984. Section 7(d) sets forth a dual test. Initially, the burden of proof is on the employer to establish that claimant's refusal to undergo medical treatment is unreasonable; if carried, the burden shifts to claimant to establish that circumstances justified the refusal. For purposes of this test, reasonableness of refusal has been defined by the Board as an objective inquiry, while justification has been defined as a subjective inquiry focusing narrowly on the individual claimant. Prior to the 1984 Amendments, only the Secretary, through the deputy commissioner could determine if claimant unreasonably refused to undergo medical treatment under Section 7(d). The 1984 Amendments also give this authority to the administrative law judge, and the administrative law judge was empowered to adjudicate this issue when the case was heard in 1985. Dodd v. Newport News Shipbuilding & Dry Dock Co., 22 BRBS 245 (1989).

The Board affirmed the administrative law judge's finding that claimant was excused for refusing to attend a medical examination scheduled by OWCP, as being reasonable and within his discretion. Under Section 702.410(b) of the regulations, 20 C.F.R. §702.410(b), an administrative law judge may order that no compensation be paid where an employee fails to submit to a scheduled examination, but is not required to do so. The administrative law judge rationally found that the examination was not essential to the resolution of the causation issue since five doctors agreed that claimant's cervical problem was causally connected, at least in part, to his work-related injury, and it was never suggested or shown that this physician possessed some medical expertise related to the determination at hand. Caudill v. Sea Tac Alaska Shipbuilding, 25 BRBS 92 (1991), aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP, 8 F.3d 29 (9th Cir. 1993).

The Board vacates the administrative law judge's suspension of benefits pursuant to Section 7(d)(4) based on claimant's refusal to undergo a laminectomy, and remands the case for reconsideration of whether claimant's refusal was unreasonable and unjustified consistent with the standards set forth in *Hrycyk*, 11 BRBS 238 (1979). The Board holds that, in finding claimant's refusal to be unreasonable, the administrative law judge erred in characterizing the medical opinions of record as unanimously recommending that a laminectomy be performed and in failing to address the treating physician's testimony that claimant's refusal was reasonable and that claimant's inability to return to work was unlikely to be affected by surgery. The Board further holds that the administrative law judge erred in finding claimant's reasons for refusing to undergo surgery to be unjustified, having discredited claimant's testimony regarding continuing pain experienced by claimant's wife after undergoing back surgery, where the administrative law judge failed to address claimant's testimony that he declined the surgery both because the physicians could not assure him that surgery would enable him to return to work and because too many things can go wrong with surgery. *Malone v. International Terminal Operating Co., Inc.*, 29 BRBS 109 (1995).

The Board affirms the administrative law judge's suspension of benefits to claimant pursuant to Section 7(d)(4), for the duration of the period he found claimant unreasonably refused to submit to medical treatment, *i.e.,* an examination by a physician which the administrative law judge ordered and employer scheduled, and where the administrative law judge rationally found that the circumstances did not justify the refusal. *See* 20 C.F.R. §702.410(b). Claimant erroneously believed that he has the right to determine the alleged independence and choice of physician. Compensation cannot be suspended retroactively, however, but only from the date of the refusal, and the case is remanded for a finding of that date. *Dodd v. Crown Central Petroleum Corp.*, 36 BRBS 85 (2002).

The Fifth Circuit affirmed the administrative law judge's finding that claimant did not unreasonably refuse to undergo surgery when the credited doctor stated that even with the surgery, there is no guarantee that claimant's functional level would improve. *Gulf Best Electric, Inc. v. Methe*, 396 F.3d 601, 38 BRBS 99(CRT) (5th Cir. 2004).

he Sixth Circuit observed that Section 7(d)(4) requires a finding that the refusal to undergo treatment is both unreasonable and unjustified, with employer having the initial burden to establish that claimant's refusal to undergo treatment is objectively unreasonable. The Sixth Circuit affirmed the administrative law judge's finding that claimant's refusal to undergo psychotherapy was not unreasonable as he did not feel depressed and had no tolerance for antidepressants. Thus, the court affirmed the administrative law judge's denial of employer's motion to compel treatment. *Pittsburgh & Conneaut Dock Co. v. Director, OWCP,* 473 F.3d 253, 40 BRBS 73(CRT) (6th Cir. 2007).

The Board held that the administrative law judge, by order, may suspend compensation pursuant to Section 7(d)(4) commencing on the date of the claimant's unreasonable refusal to undergo examination or treatment and continuing for the period of "such refusal." The Board overruled the holdings in *Johnson v. C&P Telephone Co.*, 13 BRBS 492 (1981), and *Dodd v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 245 (1989), requiring employer to obtain an order prior to suspending compensation and the holdings therein that benefits cannot be suspended during a period of refusal prior to the issuance of an order. The Board held that these procedures are no based on any statutory language. *B.C. v. Int'l Marine Terminals*, 41 BRBS 101 (2007).

The Board affirmed the administrative law judge's finding that claimant's refusal to undergo a medical examination was unreasonable, and thus affirmed the suspension of benefits during the period of the refusal. The Board stated that claimant cannot control the circumstances under which he will be examined by a physician of employer's choosing or refuse to be examined because he "lacks confidence" in the chosen physician. *B.C. v. Int'l Marine Terminals*, 41 BRBS 101 (2007).

The administrative law judge erred by stating that the opinions of independent medical experts under Section 7(e) are entitled to "dispositive weight." Such opinions are merely designed to provide the fact-finder a means to obtain a reliable, independent evaluation of a claimant's medical condition. Also, the administrative law judge should have determined whether the doctors are independent examiners under Section 7(i) because the claimant's argument, that the doctors credited by the administrative law judge are not in fact independent examiners, goes to the weight to be accorded the doctors' opinions. Cotton v. Newport News Shipbuilding & Dry Dock Co., 23 BRBS 380 (1990).

The Board affirms the administrative law judge's denial of employer's motion to remand this case to the deputy commissioner for a second impartial medical exam. Although Section 7(e) generally provides for a second impartial medical exam unless one is "clearly unwarranted" employer had ample opportunity pre-hearing to obtain necessary medical evidence, and the report from first impartial exam was not ambiguous. Martiniano v. Golten Marine Co., 23 BRBS 363 (1990).

Rejecting employer's contention that there was no "medical question" with regard to the diagnosis and treatment of claimant's back condition, the Board held that the district director acted within her statutory and regulatory authority in ordering claimant to submit to an independent medical examination, and in finding employer liable for such examination. Since claimant's treating physician observed that claimant was still symptomatic and advised claimant to consult a neurosurgeon, the Board ruled that based on the plain meaning of Section 7(e) of the Act and Section 702.408 of the regulations, medical questions existed with regard to claimant's diagnosis, as well as the appropriate treatment for claimant's condition and the nature and extent of his disability. *Augillard v. Pool Co.*, 31 BRBS 62 (1997).

The Board held that upon the referral of a case to the OALJ, the authority to suspend benefits as a result of an employee's failure to attend a medical examination scheduled by the Secretary rested with the administrative law judge and not the district director. Sections 7(f) and 19(h) of the Act are silent as to this issue, but 20 C.F.R. §702.410(b) gives this suspension authority to the district director or the administrative law judge. As neither the Act nor regulations allows for simultaneous jurisdiction over this issue, and in order to avoid the potential for administrative confusion, the Board held that only the entity before whom the case is pending may issue an order suspending compensation. The Board thus vacated the district director's suspension order, as the case had been transferred to the OALJ at the time he issued his order. *L.D. v. Northrop Grumman Ship Systems, Inc.,* 42 BRBS 1, *recon. denied,* ___ BRB ____ (2008).

Section 7(g) - Fees

The Board holds that the administrative law judge erred in placing the burden of proof on the physician to prove that his fees did not exceed the prevailing community charges, as employer bears this burden as the proponent. The Board further holds that employer did not meet this burden as its evidence is insufficient because its sample on prevailing community charges was faulty on a number of grounds. As employer did not meet its burden of proof, the administrative law judge's denial of medical fees is reversed. *Loxley v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 215 (1990), *rev'd*, 934 F.2d 511, 24 BRBS 175 (CRT) (4th Cir. 1991), *cert. denied*, U.S. , 112 S.Ct. 1941 (1992).

The Fourth Circuit reverses the Board's determination that employer, rather than the medical care providers, bears the burden of proof in establishing that disputed medical charges exceed prevailing community rates. The court stated that placing the burden of proof on the medical provider was consistent with the traditional common law rule that the proponents carry the burden of proof and Sections 702.415 and 702.416 of the regulations. The court, without purporting to determine how a physician could or should sustain this burden, found that he failed to do so in this case. The Fourth Circuit also reversed the Board's holding that the process used by employer for determining the prevailing rate for a medical service was inadequate where employer based its determination of what is the prevailing rate on data from employer's self-insured health benefit plan for its employees. In determining the prevailing rate, the court held that employer need not differentiate between generalists and specialists, as the Act and regulations refer to comparable treatment, but do not distinguish among medical providers by specialty. Moreover, it was improper for the Board to hold that employer's methodology in determining the prevailing rate was inadequate for the reason that employer did not submit evidence demonstrating the charges to patients in the relevant geographical area who were covered under any other type of plan, where the data used by employer represent greater than 70 percent of the physicians in the applicable geographic area. *Newport News Shipbuilding & Dry Dock Co. v. Loxley*, 934 F.2d 511, 24 BRBS 175 (CRT)(4th Cir. 1991), *rev'g* 23 BRBS 215 (1990), *cert. denied*, U.S. , 112 S.Ct. 1941 (1992).

Section 7(i)

The Board holds that the administrative law judge erred in refusing to address claimant's contention, that the 2 doctors credited by the administrative law judge because they were independent examiners were not in fact independent examiners. While the case was before the administrative law judge, the parties had agreed, based on the administrative law judge's recommendation, to have claimant examined by independent medical examiners, and claimant's argument that the physicians selected are not impartial under Section 7(i) because they accepted fees from employers for examinations in other cases must be resolved by the administrative law judge on remand. Cotton v. Newport News Shipbuilding & Dry Dock Co., 23 BRBS 380 (1990).

Regardless of whether claimant offers evidence of a physician's receipt of payment from employer, the plain language of Section 7(i) states that the Secretary *shall not* select a physician to perform an independent medical examination who, within the prior two years, has been employed by, or accepted or participated in any fee relating to a worker's compensation claim from any insurance carrier or any self-insurer. On reconsideration, the Board clarified that a physician who merely treats an employee of an employer is "employed by" claimant, not employer. *L.D. v. Northrop Grumman Ship Systems, Inc.,*42 BRBS 1, *recon. denied,* ___ BRB ____ (2008).