

BRB Nos. 06-0222
and 06-0222A

WILLIAM J. BURTON)
)
Claimant-Petitioner)
Cross-Respondent)
)
v.)
)
DELTA TERMINAL SERVICES) DATE ISSUED: 09/28/2006
)
and)
)
GRAY INSURANCE COMPANY)
)
Employer/Carrier-)
Respondents)
Cross-Petitioners) DECISION and ORDER

Appeals of the Decision and Order on Remand of C. Richard Avery,
Administrative Law Judge, United States Department of Labor.

William S. Vincent, Jr., and W. Jared Vincent (Law Office of William S.
Vincent), New Orleans, Louisiana, for claimant.

Collins C. Rossi, Covington, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order on Remand (2003-LHC-0971) of Administrative Law Judge C. Richard Avery rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3). This is the second time this case has been before the Board.

Claimant, a laborer, injured his back on December 30, 2000, while pushing “Yellow Grease” in the hold of a barge. Claimant ultimately required a decompression laminectomy on November 6, 2001. Employer ceased paying benefits as of December 26, 2001. EX 4. Claimant’s treating physician released him from his care on February 13, 2002. EX 11. On February 21, 2002, claimant filed a claim for continuing compensation and medical benefits. In his first Decision and Order, the administrative law judge awarded claimant temporary total disability benefits from December 30, 2000, through November 8, 2003, and ongoing permanent total disability benefits thereafter, as well as medical benefits subject to the district director’s determinations under Section 7(d)(2) of the Act, 33 U.S.C. §907(d)(2).¹

Employer appealed this decision to the Board. In its Decision and Order, the Board affirmed the administrative law judge’s admission of the deposition of Dr. Davis into the record, the denial of forfeiture of benefits under Section 8(j), 33 U.S.C. §908(j), and the finding that claimant has a continuing work-related disability. *Burton v. Delta Terminal Services*, BRB No. 04-0752 (May 16, 2005) (unpublished). However, the Board vacated the award of medical benefits arising out of the treatment provided by Drs. Gupta, McCain and Rosenfeld and remanded the case for the administrative law judge to address employer’s contentions regarding claimant’s lack of a request for authorization for treatment by these physicians and, if necessary, whether the treatment they rendered was reasonable and necessary for claimant’s work-related condition. *Id.*, slip op. at 6-7.

On remand, the administrative law judge found employer liable for the medical care provided by Dr. Gupta as he credited claimant’s testimony that he sought authorization for and employer refused to authorize treatment by a pain management specialist. However, the administrative law judge found that claimant failed to seek authorization for the treatment provided by Drs. McCain and Rosenfeld. He rejected claimant’s contention that employer’s refusal of Dr. Gupta’s treatment released claimant from the obligation of seeking further authorization. Accordingly, the administrative law judge found that employer is not responsible for these medical benefits.

Claimant appeals, contending that the administrative law judge erred in not finding employer liable for the medical treatment provided by Drs. McCain and Rosenfeld. Employer cross-appeals, arguing that the administrative law judge erred in finding it liable for the treatment provided by Dr. Gupta.

¹ The administrative law judge found that employer is liable for the services rendered by Dr. Gupta, a pain management specialist, and Dr. Davis, claimant’s psychiatrist, but remanded the case to the district director for consideration of whether the failure of these physicians to file reports should be excused pursuant to Section 7(d)(2), 33 U.S.C. §907(d)(2). Decision and Order at 21-22.

Section 7(d) of the Act, 33 U.S.C. §907(d), sets forth the prerequisites for an employer's liability for payment or reimbursement of medical expenses incurred by claimant. Section 7(d) requires that a claimant request his employer's authorization for medical services performed by any physician, including claimant's initial choice. See *Lopez v. Stevedoring Services of America*, 39 BRBS 85 (2005); *Maguire v. Todd Shipyards Corp.*, 25 BRBS 299 (1992). However, when the employer refuses a claimant's request for authorization, claimant is released from the obligation of continuing to seek approval for his subsequent treatment and thereafter need only establish that the treatment he procured on his own initiative was reasonable and necessary for his injury in order to be entitled to such treatment at employer's expense. See *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir.), cert. denied, 479 U.S. 826 (1986); *Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989). In this case, the administrative law judge found that claimant sought authorization for the treatment procured from Dr. Gupta but not for that provided by Drs. McCain and Rosenfeld and accordingly found employer liable for Dr. Gupta's treatment but not for that of Drs. McCain and Rosenfeld.

We reject employer's contention that the administrative law judge erred in finding that claimant requested authorization for pain management treatment and was refused. The administrative law judge credited claimant's testimony that he sought approval for such treatment by Dr. Gupta from Mr. Jenks, a representative of employer, and was refused. Tr. at 46-50. Moreover, claimant testified that his surgeon, Dr. Katz, recommended that he seek help from a pain management specialist. *Id.* at 46. This testimony is corroborated by Dr. Katz's reports and deposition testimony. CX 1 at 15; JX 2 at 52. The administrative law judge could properly credit this evidence, which supports his finding that claimant requested and was refused authorization for pain management treatment. See *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), cert. denied, 440 U.S. 911 (1979). As this finding is rational and supported by substantial evidence, it is affirmed. See *Roger's Terminal & Shipping Corp.*, 784 F.2d 687, 18 BRBS 79(CRT).

Employer contends that claimant had already obtained treatment from Dr. Gupta prior to Dr. Katz's referral on December 17, 2001, and that therefore it is not liable for any of Dr. Gupta's treatment. While the assertion that treatment prior to this date relieves employer of all liability for Dr. Gupta's treatment lacks merit, we agree with employer that it is not liable for Dr. Gupta's services prior to December 17, 2001. Claimant saw Dr. Gupta for treatment on December 6, 2001, but Dr. Katz did not refer claimant for pain management treatment until December 17. Claimant next saw Dr. Gupta on December 20. Claimant testified that he does not remember the exact date he sought authorization from employer for Dr. Gupta's treatment, but he testified he took Dr. Katz's advice regarding his seeking pain management. Tr. at 46-47. On these facts employer is

liable for this treatment from the earliest date that it was recommended by Dr. Katz. *See generally 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.), *cert. denied*, 534 U.S. 1002 (2001). Therefore, we hold that employer is not liable for the treatment rendered by Dr. Gupta prior to December 17, 2001, and is liable for the treatment Dr. Gupta rendered thereafter.²

In his appeal, claimant contends that the administrative law judge erred in denying reimbursement for the expenses incurred for treatment with Drs. McCain and Rosenfeld. Claimant contends that, because the administrative law judge found that employer refused Dr. Gupta's treatment, he was not required to seek approval for treatment with Drs. McCain and Rosenfeld.

We agree with claimant that the administrative law judge erred in this regard. In denying the medical expenses for treatment provided by these physicians, the administrative law judge found that claimant failed to seek authorization for services by these physicians. However, where a claimant's request for authorization is refused by the employer, claimant is released from the obligation of seeking approval for any additional treatment obtained on his own initiative thereafter. *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87 (1989); *Marvin v. Marinette Marine Corp.*, 19 BRBS 60 (1986). We have affirmed the administrative law judge's finding that employer refused claimant's request for authorization to obtain pain management treatment from Dr. Gupta. Thus, claimant was not required to seek approval for subsequent pain management treatment with Drs. McCain and Rosenfeld. *Id.* The administrative law judge's denial of benefits for claimant's treatment with these physicians is therefore vacated as it was based on claimant's failure to seek authorization for this specific subsequent treatment.

We must remand the case for the administrative law judge to explicitly address whether the treatment and testing provided by Drs. McCain and Rosenfeld was reasonable and necessary for the treatment of claimant's injury, and specifically for the pain on which the administrative law judge relied in awarding benefits in his initial decision. Claimant bears the burden of proving these necessary elements of his claim in order to recover for this medical treatment. *See Maryland Shipbuilding & Drydock Co. v. Jenkins*, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994). The administrative law judge made some cursory statements in his decision on remand which may be relevant to the necessity of this treatment, but he did not fully address this issue or premise the denial

² The administrative law judge properly premised employer's liability for this treatment on a finding by the district director that Dr. Gupta's failure to file a report of treatment pursuant to Section 7(d)(2) is excused. *See n. 1, supra.*

of benefits on a finding that additional pain management treatment was unnecessary. The administrative law judge stated that Dr. Rosenfeld performed only tests, but this fact does not establish that the tests were unnecessary. The administrative law judge also stated that it is not clear from the record that Dr. McCain's treatment did not overlap that provided by Dr. Gupta. Decision and Order on Remand at 2. Claimant's post-remand brief to the administrative law judge described the treatment provided by each physician. Their medical records are in evidence, and, in addition, Dr. Gupta testified at the formal hearing and Dr. McCain was deposed. CXs 3, 7, 9. Therefore, on remand the administrative law judge must make explicit findings of fact based on the record evidence regarding the necessity and reasonableness of the pain management treatment rendered by Drs. McCain and Rosenfeld. *See generally Ezell v. Direct Labor, Inc.*, 37 BRBS 11 (2003); *Hunt v. Newport News Shipbuilding & Dry Dock Co.*, 28 BRBS 364 (1994), *aff'd mem.*, 61 F.3d 900 (4th Cir. 1995); *Anderson*, 22 BRBS 20; *Turner v. Chesapeake & Potomac Telephone Co.*, 16 BRBS 255 (1984). Employer is liable for any reasonable and necessary medical services they provided, 33 U.S.C. §907(a), provided all other requirements are met. *See, e.g.*, 33 U.S.C. §907(d)(2).

Accordingly, the denial of medical benefits for the services of Drs. McCain and Rosenfeld is vacated, and the case is remanded for further findings consistent with this decision. The decision is modified to provide that employer's liability for Dr. Gupta's treatment commences December 17, 2001. In all other respects, the administrative law judge Decision and Order on Remand is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge