BRB No. 13-0231

RICK J. MARTIN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SUNDIAL MARINE TUG & BARGE WORKS, INCORPORATED	)	DATE ISSUED: Feb. 25, 2014
	)	
and	)	
	)	
SAIF CORPORATION	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Steven B. Berlin, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

Jill Gragg, Salem, Oregon, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (2010-LHC-0142, 0143) of Administrative Law Judge Steven B. Berlin 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant sustained injuries to both knees as a result of a work accident on February 4, 2004. He was released to regular duty without restriction on March 5, 2004. Based on MRI results showing ligament damage, Dr. Johnson performed surgery on both

of claimant's knees on May 27, 2004. Dr. Johnson released claimant to modified work duty on August 10, 2004, and to regular duty with no restrictions, effective May 25, 2005, stating there was not much else he could offer claimant. Claimant then sought treatment with Dr. Bollom, who after reviewing claimant's medical records, concluded there was nothing he could add to Dr. Johnson's analysis. Dr. Duff diagnosed degenerative joint disease of the knees, put claimant at maximum medical improvement on May 25, 2005, and, as did Drs. Johnson and Bollom, opined that no further treatment was likely to be helpful. Dr. Duff rated claimant's permanent impairment of each knee at seven percent. Dr. Johnson subsequently concurred with Dr. Duff's impairment rating.

Claimant, thereafter, saw Dr. Douglas, a family practice physician, whose primary responsibility was to manage claimant's narcotic medication. Claimant also returned to Dr. Bollom who, following an MRI on April 21, 2006, advised that while surgery probably would not help claimant's right knee, a debridement and micro-facture surgery on the left knee could be helpful. Dr. Johnson concurred with Dr. Bollom's recommendations and gave claimant a referral to Dr. Bollom, who eventually performed surgical procedures on both of claimant's knees in 2008.

On October 2, 2006, claimant sustained sprains of his right wrist, thumb and ankle as a result of an accident at work. Dr. Douglas removed claimant from work between November 17, 2006 and January 17, 2007. Dr. Douglas thereafter released claimant to four hours of work per day with a sit/stand option every two hours and with restrictions of no pulling, lifting or pushing over 30 pounds. Claimant returned to light-duty work, but was terminated by employer effective February 7, 2007.

On October 3, 2008, claimant saw Dr. Verheyden, an orthopedic surgeon, for treatment of his right hand. Dr. Verheyden diagnosed moderate carpal tunnel syndrome and recommended surgery, which he performed on October 22, 2008. Claimant also sought treatment for his right ankle with Dr. Davidson on May 6, 2009, who diagnosed a bone spur, an impingement and tibial tendinitis with a possible tear, and recommended surgery, which he performed on June 25, 2009.

In his decision, the administrative law judge found that claimant sustained work-related injuries to his knees and his right ankle, hand, and wrist. With regard to claimant's 2004 knee injuries, the administrative law judge awarded claimant temporary total disability benefits from May 12 through August 16, 2004, temporary partial disability benefits from August 16, 2004 through April 19, 2005, and permanent partial disability benefits pursuant to the schedule for each leg, based on seven percent permanent impairment ratings. As for claimant's 2006 right ankle, hand and wrist injuries, the administrative law judge awarded claimant temporary total disability benefits from November 17, 2006 through January 16, 2007, temporary partial disability benefits from January 17 through February 7, 2007, and ongoing permanent total disability

benefits thereafter. 33 U.S.C. §908(a), (b), (c)(2), (21). Finding Section 10(a), 33 U.S.C. §910(a), applicable to the calculation of claimant's average weekly wage for the 2004 work injuries pursuant to the parties' stipulation, and stating that Section 10(c), 33 U.S.C. §910(c), is applicable for the 2006 work injuries, the administrative law judge concluded that claimant's average weekly wage for all injuries is $892.83. Lastly, the administrative law judge found claimant entitled to medical benefits for treatment after August 15, 2006 of his left knee condition, but not for the right knee surgery or for any treatment rendered by Drs. Verheyden and Davidson. 33 U.S.C. §907.

On appeal, claimant challenges the administrative law judge's calculation of his average weekly wage pursuant to Section 10(a) and the denial of medical benefits for the treatment of claimant's right knee by Dr. Bollom after August 15, 2006, and of claimant's right wrist and right ankle by Drs. Verheyden and Davidson, respectively. Employer responds, urging affirmance of the administrative law judge's decision. Claimant filed a reply brief.

Average Weekly Wage

Claimant contends the administrative law judge's finding that claimant worked more than 260 days in the year preceding his 2004 injury makes it unreasonable and unfair to apply Section 10(a) and instead mandates the use of Section 10(c) to calculate his average weekly wage.

The administrative law judge found, based on the parties' stipulation, that Section 10(a) controls the calculation of claimant's average weekly wage for the 2004 knee injuries. The administrative law judge rejected claimant's "attempt to be relieved of the stipulation," as well as his contention that Section 10(c) controls the calculation of his average weekly wage. Decision and Order at 30 n. 47. The administrative law judge stated that claimant stipulated in "open court at trial" that Section 10(a) applies and that this matched his pre-trial filings, in which claimant pointed only to that provision, as well as his opening post-trial brief, wherein claimant argued that he was a five-day per week worker and that Section 10(a) controlled. *Id.* As for the 2006 injuries, the administrative law judge found Section 10(c) applicable due to the absence of sufficient data in the record to undertake a Section 10(a) calculation. Nonetheless, he accepted "the parties' view that the average weekly wage applicable to the 2004 injury should apply as well to the 2006 injury."[1] Decision and Order at 30.

[1]The administrative law judge found that the parties "throughout the pre-trial, trial and post-trial" have calculated claimant's average weekly wage for both the 2004 knee and the 2006 ankle/hand/wrist injuries based on his earning history at the time of the 2004 injuries. Decision and Order at 30. The administrative law judge found insufficient evidence for a calculation of claimant's average weekly wage based on earnings in the 52

Section 10(a) of the Act, 33 U.S.C. §910(a), looks to the actual wages of the injured worker who is employed for substantially the whole of the year prior to the injury and requires the administrative law judge to determine the average daily wage claimant earned during the preceding twelve months.[2] 33 U.S.C. §910(a); *Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148(CRT) (9th Cir. 1998). Section 10(c) applies if neither Section 10(a) nor Section 10(b) can be reasonably and fairly applied.[3] 33 U.S.C. §910(c). The United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, has held that when a claimant works 75 percent of the available workdays of the measuring year, Section 10(a) presumptively applies as long as the information necessary to calculate an average daily wage is in the record. *Id.*, 154 F.3d at 1058, 32 BRBS at 151-152(CRT); *see also General Constr. Co. v. Castro*, 401 F.3d 963, 39 BRBS 12(CRT) (9th Cir. 2005), *cert. denied*, 546 U.S. 1130 (2006). In *Matulic*, the court stated,

> Due to the fixed formula Congress adopted under §910(a), in most benefits cases there will be a degree of inaccuracy in the estimation of the workers earning capacity--ordinarily the error will favor the worker and ordinarily there will be some overcompensation, at least in theory, although in other respects the statutory formula may benefit the employer.

Matulic, 154 F.3d at 1057, 32 BRBS at 151(CRT). Thus, the underlying premise of claimant's appeal – that a Section 10(a) calculation cannot "benefit" the employer – is erroneous as a "degree of inaccuracy" between the actual wages and the theoretical

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weeks prior to the October 2006 injuries. In this regard, the parties offered only an IRS Form W-2 with no indication of how many days claimant worked in the year prior to the October 2006 injury. Decision and Order at 30 n. 48.

[2]Section 10(a) of the Act, states:

> If the injured employee shall have worked in the employment in which he was working at the time of his injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary for a six-day worker and two hundred sixty times the average daily wage or salary for a five-day worker, which he shall have earned in such employment during the days when so employed.

33 U.S.C. §910(a).

[3]There is no contention that Section 10(b) applies in this case.

wages as calculated pursuant to Section 10(a) is not unexpected and does not render the application of Section 10(a) unreasonable or unfair. *Id.*

Moreover, we reject claimant's contention that because he worked more than 260 days in the 52 weeks preceding his 2004 injuries, he cannot be viewed as a five-day per week worker. Decision and Order at 30 n. 47. The administrative law judge rejected this contention, properly finding no statutory requirement that a five-day worker work exactly 260 days in the preceding year. The administrative law judge found that claimant's pay records indicate he worked 264 days in the year preceding his injury, *see* EX 3 at 3-4, but only eight of these work weeks in the 52 weeks preceding his injury were six-day weeks. *Id.* The administrative law judge therefore concluded that claimant was a five-day per week worker. Decision and Order at 30 n. 47. This finding is rational and supported by substantial evidence, as is the finding that claimant worked 264 days in the 52 weeks preceding the injury. Claimant testified that his normal work schedule consisted of "working five days a week." HT at 124; *see also* Cl. Closing Argument Brief at 11. Additionally, as the administrative law judge found, claimant's attendance records reflect that he worked five-day work weeks in 44 of the 52 weeks preceding the injuries, and six-day weeks in eight weeks for a total of 264 days. EX 3 at 3-4. Therefore, we affirm the finding that claimant was a five-day per week worker who worked 264 days in the year prior to the 2004 injury. *See generally Trachsel v. Rogers Terminal & Shipping Corp.*, 597 F.3d 947, 43 BRBS 73(CRT) (9th Cir. 2010).

Since claimant was a five-day per week worker, the number of days he actually worked was 264, and claimant worked at least 75 percent of the available work days, the administrative law judge properly applied Section 10(a) to calculate claimant's average weekly wage. *Castro*, 401 F.3d 963, 39 BRBS 13(CRT); *Stevedoring Services of America v. Price*, 382 F.3d 878, 38 BRBS 51(CRT) (9th Cir. 2004), *cert. denied*, 544 U.S. 960 (2005). Thus, the administrative law judge properly held claimant to his stipulation that his average weekly wage for his 2004 injuries should be calculated pursuant to Section 10(a), as that stipulation is not contrary to law. 29 C.F.R. §18.51; *Brown v. Maryland Shipbuilding & Drydock Co.*, 18 BRBS 104 (1986); *Littrell v. Oregon Shipbuilding Co.*, 17 BRBS 84 (1985). Moreover, given the absence of sufficient data for making an average weekly wage calculation for the 2006 injuries, we hold that the administrative law judge rationally accepted "the parties' view that the average weekly wage applicable to the 2004 injury should apply as well to the 2006 injury." Decision and Order at 30. We note, however, that the administrative law judge made an accounting error in applying his findings.[4] We modify the decision to reflect the correct

[4]Claimant's earnings of $47,498.41 divided by the 264 days worked results in an average daily wage of $179.92, rather than $178.57 as found by the administrative law judge. Multiplying claimant's daily wage of $179.92 by 260 days yields an annual

calculation; accordingly, claimant's average weekly wage for all injuries in this case is $899.60, rather than $892.83.

Medical Benefits- Right Knee

Claimant contends the administrative law judge erred by finding that employer is not liable for any treatment by Dr. Bollom to claimant's right knee, including the surgery on August 12, 2008. Claimant avers that Dr. Johnson's referral of claimant to Dr. Bollom on August 15, 2006, for *bilateral* knee pain, coupled with Dr. Bollom's statement that the August 12, 2008 surgical procedure on claimant's right knee was "reasonable," is sufficient to establish claimant's entitlement to medical benefits relating to that procedure.

In 2005, employer denied claimant's request for treatment with Dr. Bollom. It is undisputed, as the administrative law judge found, that thereafter, on August 15, 2006, Dr. Johnson, claimant's treating physician for purposes of the February 2004 knee injuries, referred claimant to Dr. Bollom. Dr. Bollom performed procedures on claimant's knees in 2008. Employer also denied authorization for this treatment. As both Dr. Bollom and Dr. Johnson recommended that claimant undergo the surgical procedure to claimant's left knee, the administrative law judge concluded that employer is liable for that treatment. The administrative law judge found, however, that since Dr. Bollom did not recommend right knee surgery, and instead, counseled against it, and as Dr. Johnson concurred only with Dr. Bollom's recommendation for the left knee surgery, the right knee surgery was not based on an opinion that claimant's work-related medical condition required it. Consequently, the administrative law judge found that employer is not liable for the right knee surgery.

Where, as here, the employee requests, but employer refuses, authorization for medical treatment, any treatment procured thereafter need only be reasonable and necessary for the treatment of the work injury for employer to be liable. *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). Substantial evidence does not support the administrative law judge's findings that Dr. Bollom "never recommended [right knee] surgery; he counseled against it," and that "Dr. Johnson's concurrence was in Dr. Bollom's recommendation of the left knee surgery, not surgery on both knees." Decision and Order at 33. While Dr. Bollom cautioned that the relief provided by a surgical procedure to claimant's right knee may be "short lived," he did not counsel against it.

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compensation rate of $46,779.20, with a corresponding average weekly wage of $899.60. 33 U.S.C. §910(a), (d).

Rather, Dr. Bollom concluded that such surgical intervention "is a reasonable approach."[5] CX 33. On August 15, 2006, Dr. Johnson stated that claimant returned for "follow-up with persisting bilateral knee pain;" he acknowledged the specific recommendation for left knee surgery, but also reviewed the MRIs of both knees and generally noted that "these findings are certainly consistent with the patient's symptoms." CX 21. Consequently, Dr. Johnson referred claimant to Dr. Bollom "to pursue further treatment." *Id.* Although the referral was not specifically for *bilateral* knee treatment as claimant avers, the evidence may, nonetheless support a finding that Dr. Johnson's referral to Dr. Bollom was for the treatment of both knees. Therefore, we vacate the administrative law judge's denial of medical benefits after August 15, 2006, for claimant's right knee treatment, and remand the case for further consideration of this issue. In particular, the administrative law judge must address whether Dr. Johnson's August 15, 2006 treatment note referring claimant to Dr. Bollom to "pursue further treatment," included treatment of both knees. *See* 20 C.F.R. §702.406(a). If so, the administrative law judge must make findings whether the treatment and surgery for claimant's right knee provided by Dr. Bollom was reasonable and necessary for the treatment of the work injuries. *Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998), *amended*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir.), *cert. denied*, 528 U.S. 809 (1999).[6]

[5]On July 24, 2008, Dr. Bollom noted that claimant "wishes that we would consider a right knee arthroscopy." CX 33. After explaining to claimant that "his right knee is a more difficult case," and that any surgical fix may "be very short-lived," Dr. Bollom discussed the right knee procedure with claimant and nonetheless opined that "I think that [the surgery] is a reasonable approach." *Id.* Dr. Bollom performed surgery on claimant's right knee on August 12, 2008.

[6]In *Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998), *amended*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir.), *cert. denied*, 528 U.S. 809 (1999), the Ninth Circuit held that greater weight may be accorded to a treating physician's opinion regarding treatment options since he is employed to cure and has a greater opportunity to know and observe the patient as an individual. *Id.*, 164 F.3d at 1054, 32 BRBS at 147(CRT). The court further held that, on the facts of that case, the administrative law judge was required to credit the claimant's treating physician about the recommended course of treatment since his opinion is entitled to special deference and it was not shown by the testimony of other doctors to be unreasonable. The court's holding, therefore, is based on two factors: the doctor was the treating physician and the other medical evidence of record did not show his opinion to be unreasonable.

Medical Benefits – Right Ankle and Right Wrist

Claimant contends the administrative law judge erred by denying benefits for treatment provided by Drs. Verheyden and Davidson, respectively, on his right wrist and right ankle. Claimant avers the administrative law judge erred in finding that claimant's failure to obtain authorization for this treatment bars his recovery of medical benefits because he is entitled to select an appropriate specialist. Claimant also contends the administrative law judge erred in finding that the conditions for which he sought treatment are not related to the 2006 work accident.

We affirm the finding that employer is not liable for this treatment. The administrative law judge properly found that employer is not liable for the treatment claimant received from Drs. Verheyden and Davidson as claimant did not request authorization to treat with them, nor did his treating general physician, Dr. Douglas, refer claimant to either of these doctors. While claimant is entitled to select an appropriate specialist, he must request prior authorization from the district director or employer. *See* 33 U.S.C. §907(c)(2), (d); *Parklands, Inc. v. Director, OWCP*, 877 F.2d 1030, 22 BRBS 57(CRT) (D.C. Cir. 1989); 20 C.F.R. §702.40. There is no evidence that claimant sought authorization to treat with Dr. Verheyden, and claimant testified that he did not seek authorization to treat with Dr. Davidson. HT at 151-152. The failure to seek authorization precludes employer's liability for this treatment. *Maryland Shipbuilding & Dry Dock Co. v. Jenkins*, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979); *Ranks v. Bath Iron Works Corp.*, 22 BRBS 301 (1989).

Moreover, substantial evidence supports the administrative law judge's finding that the treatment was not necessitated by claimant's 2006 work injury. In this regard, the administrative law judge found that claimant had recovered from the work-related injuries to his right wrist and ankle before either Dr. Davidson or Dr. Verheyden treated him, as claimant had had many medical appointments without seeking treatment for wrist and ankle complaints until October and December 2008, respectively. *See* CXs 25-28. With regard to the carpal tunnel syndrome, Dr. Bell's opinion supports the administrative law judge's finding that this condition did not arise in an acute manner from the work accident.[7] EX 68. With regard to the ankle injury, Dr. Davidson did not attribute the

[7]Dr. Bell stated that claimant's carpal tunnel syndrome "would fall under the category of an occupational disease rather than an injury," most likely developed "over a period of time in association with both personal factors and work activities." She stated the carpal tunnel syndrome did not arise from the work accident and claimant did not require additional treatment for the work injury. EX 68. The record reflects that claimant did not raise before the administrative law judge a claim that his carpal tunnel syndrome resulted from general working conditions, but rather consistently argued, up

right ankle condition to the October 3, 2006 work accident. Instead, Dr. Davidson attributed it to "a significant inversion injury" claimant sustained "last year," i.e., sometime in 2008, well after the 2006 injury and after claimant had stopped working for employer. EX 62. We, therefore, affirm the denial of medical benefits relating to the carpal tunnel syndrome and the right ankle condition as it is supported by substantial evidence and in accordance with law. *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).

Accordingly, the administrative law judge's decision is modified to reflect an average weekly wage of $899.60 for claimant's 2004 and 2006 injuries. The administrative law judge's denial of medical benefits relating to Dr. Bollom's treatment of claimant's right knee commencing August 15, 2006, is vacated and the case is remanded for further consideration consistent with this opinion. In all other regards, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

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until the time of this appeal, that his carpal tunnel syndrome arose as a direct result of the October 2006 incident. *See generally U.S. Industries/Federal Sheet Metal, Inc., v. Director, OWCP,* 455 U.S. 608, 14 BRBS 631 (1982). We thus decline to address claimant's contentions that his wrist condition is compensable on a general working conditions theory of recovery. *Turk v. E. Shore R.R., Inc.*, 34 BRBS 27 (2000).