BRB No. 01-599

KENNETH MORRIS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CERES GULF, INCORPORATED	)	DATE ISSUED: April 11, 2002
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Marcus J. Poulliard, New Orleans, Louisiana, for claimant.

Kathleen K. Charvet and Adam C. McNeil (McGlinchey Stafford, P.L.L.C.), New Orleans, Louisiana, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (1996-LHC-1696) of Administrative Law Judge Larry W. Price 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, who had worked on the waterfront for thirty-four years and obtained A1 seniority status, injured his back on July 31, 1989, while loading cargo for employer.[1] Employer voluntarily paid disability and medical benefits, but the parties disputed claimant's average weekly wage and the compensability of treatment provided by Dr. Whitecloud. The administrative law judge found that claimant is entitled to temporary total disability benefits from July 31, 1989, through November 8, 1991, the date on which claimant's work injury resolved with no residual effects, and he awarded benefits based on employer's calculation of claimant's average weekly wage, $256.39. Decision and Order at 6, 16, 18. The administrative law judge also concluded that employer is not liable for services rendered by Dr. Whitecloud because he and Dr. McLachlan, claimant's treating physician, are both specialists in orthopedic surgery. *Id.* at 17. Claimant appealed the decision. The Board affirmed the finding that the work-related condition resolved as of November 8, 1991. However, it vacated the award of disability benefits and the denial of medical benefits covering Dr. Whitecloud's services. The Board remanded the case to the administrative law judge for him to reconsider the issues of average weekly wage and the compensability of Dr. Whitecloud's services because his findings on those issues were incomplete. *Morris v. Ceres Gulf, Inc.*, BRB No. 99-879 (May 18, 2000).

On remand, the administrative law judge rejected the use of Section 10(a), 33 U.S.C. §910(a), for determining average weekly wage because claimant did not work substantially the whole of the year, and he rejected the use of Section 10(b), 33 U.S.C. §910(b), because claimant's employment was not similar to either Mr. Tumminello or to the average worker with A1 seniority. Decision and Order on Remand at 1-2. Instead, he found that Section 10(c), 33 U.S.C. §910(c), was appropriate, and that claimant's actual earnings were the best approximation of his annual wage-earning capacity as of the time of his injury. The administrative law judge adopted employer's calculation and found that claimant's average weekly wage is $256.39 ($13,332.46 divided by 52). *Id.* at 3. On the issue of whether employer is liable for the cost of Dr. Whitecloud's services, the administrative law judge credited the testimony of employer's claims examiner and found that employer did not deny authorization for the MRI recommended by Dr. McLachlan because claimant did not request such authorization. Moreover, he stated, even if employer had denied authorization for the MRI, that denial did not amount to a refusal of treatment because claimant obtained the MRI and continued to treat with Dr. McLachlan for another six months, and there is no evidence employer refused to pay these bills. Decision and Order on Remand at 4-5. Claimant appeals, and employer responds, urging affirmance.

[1]Claimant sustained an injury to his elbow in 1985 and returned to work in February 1988. Emp. Ex. 13; Tr. at 38-41.

Claimant first contends the administrative law judge erred in computing his average weekly wage. Specifically, claimant argues that the administrative law judge should have considered both Mr. Tumminello's earnings and the average A1 man's earnings in calculating claimant's average weekly wage under Section 10(c). He also argues that the administrative law judge should have accounted for periods of non-work during the year preceding the injury, thereby more reasonably representing claimant's true earning capacity.

Under Section 10(c), the administrative law judge has broad discretion to arrive at a fair approximation of a claimant's average annual earnings at the time of his injury. Actual earnings need not control; however, the administrative law judge must make a finding as to a dollar amount that reasonably represents the claimant's annual earning capacity.[2] *Staftex Staffing v. Director, OWCP*, 237 F.3d 404, 34 BRBS 44(CRT), *modified on other grounds on reh'g*, 237 F.3d 409, 34 BRBS 105(CRT) (5th Cir. 2000); *National Steel & Shipbuilding Co. v. Bonner*, 600 F.2d 1288 (9th Cir. 1979). In this case, the administrative law judge rationally considered claimant's actual earnings during the year preceding his injury, *see Staftex Staffing*, 237 F.3d at 408, 34 BRBS at 46(CRT), and he found that claimant missed too many weeks of work to allow a reasonable comparison between his situation and that of the average A1 man. The administrative law judge also found that, as Mr. Tumminello was a foreman and claimant was not, claimant's average weekly wage should not be based on Mr. Tumminello's earnings. Decision and Order on Remand at 2-3. These findings are rational, are supported by substantial evidence, and are affirmed.

In computing claimant's average weekly wage, the administrative law judge, without discussion, concluded that claimant's earnings during the 33 weeks he actually worked during the year preceding his injury reasonably represented claimant's annual earning capacity. Thus, he divided claimant's actual earnings over this period of 33 weeks, $13,332.46, by 52 to reach an average weekly wage of $256.39. Such a calculation is impermissible absent a finding, after considering all relevant evidence, that the sum claimant earned during the course of 33 weeks of work represents his annual earning capacity. *Brien v. Precision Valve/Bayley Marine*, 23 BRBS 207 (1990).

[2]For example, actual earnings should not be used if there is evidence that the claimant worked an increasing number of hours or demonstrated an increasing physical ability to work. *Hastings v. Earth Satellite Corp.*, 628 F.2d 85, 14 BRBS 345 (D.C. Cir.), *cert. denied*, 449 U.S. 905 (1980).

During the 52-week period preceding claimant's injury, claimant missed nine weeks of work because he was suspended for fighting. He also testified that he missed four weeks thereafter because rumors spread about his temper and foremen would not hire him.[3] Cl. Ex. 2; Tr. at 43-44. The administrative law judge acknowledged these periods of non-work, and used them to distinguish claimant's situation from that of the average A1 man. Nevertheless, he did not discuss the effect of these periods when claimant was not working upon claimant's annual earning capacity or account for the missed time in his computation of claimant's average weekly wage.

[3]Claimant missed additional time from work for unknown reasons.

Section 10(d)(1) of the Act provides that an administrative law judge must divide a claimant's average annual earnings by 52 in order to arrive at an average weekly wage. 33 U.S.C. §910(d)(1). Before doing so, however, Section 10(c) requires that the administrative law judge "arrive at a sum that reasonably represents a claimant's annual earning capacity at the time of injury," *i.e.*, the "amount that the employee would have the potential and opportunity of earning absent the injury." *Empire United Stevedores v. Gatlin,* 936 F.2d 819, 823, 25 BRBS 26, 29(CRT)(5th Cir. 1991)(citations and internal quotation marks omitted). In computing a claimant's average earning capacity, the Board has held that an administrative law judge should account for time lost from work; thus, a claimant's earnings need not be reduced due to time missed for non-recurring involuntary events.[4] *Browder v. Dillingham Ship Repair*, 24 BRBS 216, *aff'd on recon.*, 25 BRBS 88 (1991) (funeral); *Brien*, 23 BRBS at 211 (other work injury); *Klubnikin v. Crescent Wharf & Warehouse Co.*, 16 BRBS 182 (1984) (non-work injury); *LeBatard v. Ingalls Shipbuilding Div., Litton Systems, Inc.*, 10 BRBS 317 (1979) (strike); *Holmes v. Tampa Ship Repair & Dry Dock Co.*, 8 BRBS 455 (1978) (layoff). The United States Court of Appeals for the Fifth Circuit, in whose jurisdiction this case arises, has agreed that accounting for lost work time is reasonable when determining average weekly wage. *Staftex Staffing*, 237 F.3d at 408, 34 BRBS at 46(CRT) (citing *Hawthorne v. Director, OWCP*, 844 F.2d 318, 21 BRBS 22(CRT) (6th Cir. 1988)); *James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000). In this vein, the court stated that, while Section 10(d) contemplates that an administrative law judge will increase his estimation of the claimant's annual wage and then divide by 52, rather than increasing the weekly average by using a lower divisor, "[e]ither approach yields the same mathematical result." *Staftex Staffing*, 237 F.3d at 408, 34 BRBS at 46-47(CRT); *see also Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT). Therefore, in *Staftex Staffing*, the Court held that it was reasonable for the administrative law judge to divide the claimant's actual earnings by the actual number of weeks worked. *Staftex Staffing*, 237 F.3d 404, 34 BRBS 44(CRT).

Because the administrative law judge in this case did not discuss claimant's periods of involuntary non-work in relation to ascertaining claimant's pre-injury annual earning capacity, we vacate his average weekly wage finding. On remand, the administrative law judge must consider the evidence of record in light of the above-referenced cases and arrive at a reasonable estimate of claimant's annual

[4]The Board has held that a claimant's average earnings also need not be reduced because of criminal or other socially undesirable activities which may have affected the claimant's earning history. *Daugherty v. Los Angeles Container Terminals, Inc.*, 8 BRBS 363 (1978).

earnings at the time of his injury. The administrative law judge must consider the effect of claimant's periods of non-work on his average annual earnings and reach a result consistent with *Staftex Staffing* and other relevant precedent.

Claimant also contends the administrative law judge erred in finding that employer is not liable for the cost of Dr. Whitecloud's treatment. Claimant argues that employer refused to authorize an MRI recommended by Dr. McLachlan, thereby refusing claimant further treatment, and in response claimant sought medical care with Dr. Whitecloud. We reject claimant's assertion and affirm the administrative law judge's findings.

An employer's liability for a claimant's medical treatment is governed by Section 7 of the Act. 33 U.S.C. §907. In order to be reimbursed for medical expenses, claimant must request authorization from employer for such treatment; if the requested authorization is denied, he may be reimbursed for medical treatment he thereafter obtained on his own if it is reasonable and necessary for his work condition. 33 U.S.C. §907(a), (d); *Jackson v. Ingalls Shipbuilding Div., Litton Systems, Inc.*, 15 BRBS 299 (1983) (Miller, J., dissenting); 20 C.F.R. §702.421. If a claimant wishes to change physicians, he must seek prior written approval from the employer, carrier or the district director. 33 U.S.C. §907(b), (c); *Jackson v. Universal Maritime Services Corp.*, 31 BRBS 103 (1997) (Brown, J., concurring); *Hunt v. Newport News Shipbuilding & Dry Dock Co.*, 28 BRBS 364, *aff'd mem.*, 61 F.3d 900 (4th Cir. 1995); 20 C.F.R. §702.406.

In this case, the administrative law judge found that the only mention of a denial of authorization for the recommended MRI was in Dr. McLachlan's report. To the contrary, employer submitted evidence from its claims examiner, which was credited by the administrative law judge, stating that he never received a request for authorization or a bill for the MRI. Decision and Order on Remand at 4-5; Remand Exh. A. Based on this evidence, the administrative law judge rationally found that claimant did not request authorization and, therefore, was not denied authorization. *Ranks v. Bath Iron Works Corp.*, 22 BRBS 301 (1989); Decision and Order on Remand at 5. Moreover, the administrative law judge found that, even if employer refused authorization for the MRI, such a refusal did not amount to a refusal of treatment warranting the need for claimant to seek medical care on his own. Rather, as the administrative law judge stated, claimant underwent the MRI and continued to treat with Dr. McLachlan for approximately six more months, and there is no evidence employer refused to pay for this treatment. Decision and Order on Remand at 5; Cl. Exs. 5, 8-9; *see Hunt*, 28 BRBS 364. Finally, the administrative law judge found that claimant did not visit Dr. Whitecloud because he was refused treatment with Dr. McLachlan; rather, the evidence establishes that a doctor, likely

Dr. McLachlan, referred claimant to Dr. Whitecloud for a second opinion. Decision and Order on Remand at 5; Cl. Exs. 5, 8. As claimant did not request approval to change his physician to Dr. Whitecloud, employer is not liable for Dr. Whitecloud's services. *Slattery Assocs., Inc. v. Lloyd*, 725 F.2d 780, 16 BRBS 44(CRT) (D.C. Cir. 1984). The administrative law judge's conclusions are supported by substantial evidence of record; therefore, we affirm the finding that employer is not liable for the cost of Dr. Whitecloud's services. *Ranks*, 22 BRBS 301; *Lustig v. Todd Shipyards Corp.*, 20 BRBS 207 (1988), *aff'd in pertinent part sub nom. Lustig v. U.S. Dep't of Labor*, 881 F.2d 593, 22 BRBS 159(CRT) (9th Cir. 1989).

Accordingly, the administrative law judge's average weekly wage calculation is vacated, and the case is remanded for further consideration consistent with this opinion. In all other respects, the 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