BRB No. 02-0790

BILLIE DON STANLEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
TCB INDUSTRIES	)	DATE ISSUED: 08/07/2003
	)	
and	)	
	)	
LEGION INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Granting Benefits of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

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

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

PER CURIAM:

Employer appeals the Decision and Order Granting Benefits (01-LHC-2135) of Administrative Law Judge Clement J. Kennington 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).

Claimant, a rigger on an offshore platform, suffered an injury to his back on February 12, 1997 and subsequently underwent surgery on October 14, 1997, and February 11, 1999. The parties entered into a Section 8(i), 33 U.S.C. §908(i), settlement resolving the claim for future medical expenses; the parties also agreed that all past

medical expenses except those connected to claimant's second surgery had been paid. EX 7.

In his decision, the administrative law judge determined that claimant reached maximum medical improvement as of February 12, 2001. He further found that claimant is entitled to permanent total disability compensation based upon an average weekly wage of $390.35, and that claimant is entitled to reimbursement for all medical expenses incurred as well as outstanding medical bills related to his February 11, 1999, surgery.

On appeal, employer contends that the administrative law judge erred in determining claimant's average weekly wage under Section 10(b) of the Act, 33 U.S.C. §910(b). Employer also contends that the administrative law judge improperly determined that it is liable for the full cost of claimant's 1999 surgery. Claimant has not responded to this appeal.

Employer initially challenges the administrative law judge's calculation of claimant's average weekly wage at the time of his injury, contending that the administrative law judge should have utilized Section 10(c) rather than Section 10(b). Section 10(b) applies if a claimant's employment is regular and continuous, but the claimant has not worked substantially the whole of the year prior to the injury. Under such circumstances, Section 10(b) provides that the claimant's average weekly wage is based on the wages of an employee of the same class working in similar employment and in the same locality. *Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 1025, 32 BRBS 91(CRT) (5th Cir. 1998). In this case, the administrative law judge used the wages of a similarly situated worker that were provided by employer,[1] CX 10, and determined that that individual's average weekly wage was $390.35.

Employer contends that claimant's average weekly wage should have been determined under Section 10(c), citing *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26 (CRT)(5th Cir. 1991), for the proposition that Section 10(c) is to be used where the claimant's work is intermittent or discontinuous. Section 10(c) is a catchall provision to be used in instances when neither Section 10(a) nor Section 10(b) can be reasonably and fairly applied. *Hall*, 139 F.3d 1025, 32 BRBS 91(CRT). Employer

[1]Although employer submitted the wage records of numerous other riggers, CX 10, the administrative law judge determined that only two were similar to claimant in that they were considered average riggers who would most likely work the same number of hours per year at the same rate of pay. Decision and Order at 17. The administrative law judge rejected the data provided on a second similar "average" worker because his wages were pre-set and claimant worked offshore at different rates of pay depending on the amount of overtime he worked. Decision and Order at 18.

contends that claimant's employment as an ironworker prior to his becoming a rigger was intermittent and sporadic, and thus Section 10(c) is applicable.[2]

We reject employer's arguments. The Fifth Circuit, in whose jurisdiction this case arises, has held that the administrative law judge properly calculates claimant's average weekly wage pursuant to Section 10(c) where claimant's work is "inherently discontinuous or intermittent." *Gatlin*, 936 F.2d at 820, 25 BRBS at 28(CRT). In the instant case, however, claimant regularly and steadily worked as a rigger since the date of his hiring, October 28, 1996, until he was injured on February 12, 1997; indeed, claimant testified that he informed employer that he required permanent and continuous work and employer assigned him a rigging and maintenance job on a platform which required him to work fourteen days on the rig, followed by seven days off. HT at 35-36. Thus, claimant's work for employer was neither intermittent nor sporadic, and, in applying Section 10(b), the administrative law judge did not err in relying upon claimant's "good fortune" in obtaining regular and continuous employment. *See Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988). As the administrative law judge's use of Section 10(b) to calculate claimant's average weekly wage of $390.35 is rational, supported by substantial evidence, and in accordance with law, it is affirmed.

Employer next argues that the administrative law judge erred in determining that it is liable for the entire medical cost associated with claimant's February 11,1999 back surgery. Employer does not contend that this surgery was unrelated to claimant's work injury or unnecessary to treat the injury. It is employer's contention that this issue was neither properly before the administrative law judge nor decided by him in compliance with the regulations.

Contrary to employer's contention, the issue of employer's liability for the medical expenses arising out of this surgery has always been in dispute between the parties. The record reflects that at the first informal conference, held on March 10, 1999, the claims examiner noted that the need for the second surgery had been agreed to by carrier's physician. The claims examiner recommended that carrier be responsible for the cost of the repeat laminectomy but not the fusion procedure. CX 9. Although the second informal conference on April 10, 2001, did not address payment of these medical bills, CX 5, the settlement agreement entered into on May 16, 2000, specifically states that

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[2]Employer alleges that a more accurate determination of claimant's average weekly wage is either $304.81 based on his 1996 non-longshore earnings of $15,850.25 divided by 52 weeks or $333.91 based on $19,683.00, his non-longshore earnings plus his longshore earnings in 1996 and the first seven weeks of 1997, divided by 59. Employer's calculation of the second figure is mathematically incorrect as claimant's earnings for 1996 and the first six weeks of 1997 total $21,182.24, CX 1, which when divided by 58 weeks equals $362.21 per week.

claimant retains the right to seek reimbursement of the medical expenses associated with the February 11, 1999, surgery. CX 7. Finally, the stipulations presented to the administrative law judge prior to the hearing state that among the unresolved issues before the administrative law judge was the payment of outstanding medical expenses. ALJX 1. Accordingly, this issue was properly before the administrative law judge, *see generally Weikert v. Universal Maritime Serv. Corp.*, 36 BRBS 38 (2002), and employer had long-standing notice that this contested issue was ripe for decision.

Although conceding that it is liable for some portion of the costs, employer argues that the entirety of the medical expenses arising out of the second surgery are not reasonable,[3] and that the proper procedures were not followed to determine the reasonableness of the requested fees. Employer urges that the administrative law judge's imposition of liability for all charges must be vacated and the case remanded to the district director for the proper procedures. In his decision, the administrative law judge stated that employer lost the ability to contest the reasonableness of the medical charges when it unreasonably refused to authorize the surgery. The administrative law judge further stated that allowing employer to lower the amount of its liability to the medical providers would result in claimant's liability for the difference, contrary to the intent of the Act. Decision and Order at 23.

We hold that the administrative law judge properly determined that employer is liable for the payment of costs associated with claimant's 1999 surgery, and it must reimburse claimant for all amounts paid by him. *See generally Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1987). As it is undisputed that the surgery was necessary for treatment of a work-related condition, the administrative law judge properly held employer liable for claimant's medical benefits. 33 U.S.C. §907(a). As employer is liable, claimant is entitled to reimbursement of the expenses he personally paid to the medical providers, and claimant cannot be liable for any of these expenses.

We further hold, however, that the administrative law judge erred in stating that employer, by refusing to authorize the surgery, lost its ability to challenge the reasonableness of the amount charged by the medical providers. Section 7(g) of the Act states in relevant part:

> All fees and other charges for medical examinations, treatment, or service shall be limited to such charges as prevail in the community for such treatment, and shall be subject to regulation by the Secretary.

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[3]The cost awarded by the administrative law judge was $56,920.78. Decision and Order at 25. This includes $19,338 for the surgeon and $37,129.78 in hospitalization and related costs, less a deposit of $4000 paid by claimant. CX 7.

33 U.S.C. §907(g); *see also* 20 C.F.R. 702.413 (referring to fee schedules in regulations promulgated pursuant to other statutes). The district director is charged with supervising the medical care of an injured employee; this supervision includes the authority to determine "whether the charges made by any medical care provider exceed those permitted under the Act." 20 C.F.R. §702.407(b). Section 702.414, 20 C.F.R. §702.414, states that the district director "may, upon written complaint of an interested party . . . investigate any fee for medical treatment . . . that appears to exceed prevailing community charges . . . ."[4] The district director then makes specific findings on whether the fee exceeds the prevailing community charges and provides notice of his or her findings to the interested parties. 20 C.F.R. §702.414(c). If a party disputes this finding or the proposed action, it has a right to request an administrative hearing before an administrative law judge pursuant to 5 U.S.C. §556. *See Newport News Shipbuilding & Dry Dock Co. v. Loxley*, 934 F.2d 511, 24 BRBS 175(CRT)(4th Cir. 1991), *cert. denied*, 504 U.S. 910 (1992); 20 C.F.R. §§702.416, 702.417.

These provisions provide procedures separate from the determination of liability, establishing a framework for the liable party, employer in this case, to challenge the reasonableness of the amount charged by the medical providers. Employer argues that these procedures for determining the prevailing rates for medical services were not followed in this case. As claimant is not liable for these costs, any dispute over the prevailing rate is between employer and the medical providers. If employer believes the medical charges exceed prevailing community rates, it is employer, *i.e.*, the "interested party," who must initiate a written complaint with the district director, pursuant to Section 702.414 of the regulations.[5] *See Loxley*, 934 F.2d 511, 24 BRBS 175(CRT). Thus, while employer must reimburse claimant in full for amounts he has paid, employer may initiate proceedings against the provider to challenge the amount charged in accordance with the regulations.

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[4]This investigation may be conducted through informal contact with the provider, an informal conference with all interested parties, by interrogatories to the provider, or by subpoena for documents relevant to the dispute. 20 C.F.R. §702.414(a).

[5] Employer can also compensate the provider for the amount it calculates is due, in which case the provider may file a complaint with the district director. In *Loxley*, employer, believing Dr. Loxley's charges exceeded the prevailing community rates, paid only the amount it calculated was due. Dr. Loxley challenged employer's calculation, and the court held he bore the burden of proving his charges were within the prevailing community rate, affirming the administrative law judge's ruling that he did not meet this burden.

Accordingly, we affirm the administrative law judge's finding that employer is liable for claimant's 1999 surgery and must reimburse claimant for these medical costs. However, we vacate the decision insofar as it holds employer cannot challenge the amount of the providers' charges, and employer may do so under the procedures discussed in this opinion. In all other respects, the administrative law judge's Decision and Order Granting Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge