BRB No. 03-0401

JOHN N. SIMMS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PNEU-ELECT, INCORPORATED	)	DATE ISSUED: Feb. 25, 2004
	)	
and	)	
	)	
RELIANCE INSURANCE COMPANY c/o LOUISIANA INSURANCE GUARANTY ASSOCIATION	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and the Decision and Order Denying Employer's Motion for Reconsideration of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Andre F. Toce and Michael G. Daiy (Toce & Daiy, L.L.C.), Lafayette, Louisiana, for claimant.

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 Awarding Benefits and the Decision and Order Denying Employer's Motion for Reconsideration (02-LHC-1014) 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 injured his back on October 16, 1999, while installing electrical instrumentation on an offshore platform. Claimant was initially treated in a hospital on October 17, 1999, CX 23 at 5, and then by employer's physicians at the Occupational Medicine Clinic of Acadiana. Claimant thereafter requested Dr. Phillips, an orthopedic surgeon, as his choice of physician and employer's carrier authorized this choice. CX 3 at 1-3. Employer subsequently controverted claimant's right to compensation three times: on December 7, 1999; on July 24, 2000; and on October 23, 2000. CXs 15 at 19; 6 at 1. Employer paid claimant disability benefits from October 28, 1997, until May 5, 2000. CX 20. Employer also paid claimant's physical therapy bills incurred between February 9, 2000, and October 16, 2000. The parties stipulated that as of September 13, 2002, claimant's medical expenses totaled $93,958.26, of which employer paid $5,439.44. ALJX. 1, Stip. 8b. On August 7, 2001, the parties held an informal conference before a Department of Labor claims examiner.

In his Decision and Order Awarding Benefits issued on December 27, 2002, the administrative law judge awarded claimant continuing temporary total disability compensation beginning on October 17, 1999, based on an average weekly wage of $904.83, pursuant to Section 8(b) of the Act, 33 U.S.C. §908(b); a Section 14(e), 33 U.S.C. §914(e), penalty on compensation payable to claimant from May 6, 2000, to July 24, 2000; reimbursement for all treatment rendered by Drs. Phillips, Reavill, Gammel and Friedberg; payment for future work-related medical care; and interest. Decision and Order at 38. In his Decision and Order Denying Employer's Motion for Reconsideration issued on January 30, 2003, the administrative law judge determined that employer's denial of claimant's reasonable and necessary treatment with Dr. Phillips relieved claimant of his subsequent obligation to request authorization to treat with Drs. Reavill, Gammel and Friedberg. He therefore found that employer's approval was not required for claimant to begin treatment with Dr. Reavill, for claimant to change pain management specialists from Dr. Reavill to Dr. Gammel, and for claimant to obtain treatment with Dr. Friedberg.[1] Decision on Reconsideration at 4. As employer did not challenge the administrative law judge's prior finding that claimant's treatment with these physicians was reasonable and necessary, the administrative law judge denied employer's request for reconsideration and awarded claimant medical expenses for all treatment rendered by Drs. Phillips, Reavill, Gammel and Friedberg.

[1] Dr. Phillips is an orthopedic surgeon; Drs. Reavill and Gammel are pain management specialists; and Dr. Friedberg is a psychologist.

On appeal, employer challenges the administrative law judge=s award of reimbursement for medical expenses as contained in the Decision and Order Awarding Benefits and the Decision and Order Denying Employer=s Motion for Reconsideration. Specifically, employer asserts that claimant did not request prior authorization for treatment by Drs. Reavill, Gammel and Friedberg, pursuant to the requirements of Section 7(d), and therefore, it was error on the part of the administrative law judge to award claimant reimbursement for treatment by these physicians. Claimant responds, urging affirmance. Employer has filed a reply brief.

We first address employer's contention that the administrative law judge erred in finding that by ceasing payments of compensation to claimant on May 2, 2000, it essentially refused claimant's medical treatment. 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. The Board has held that Section 7(d)(1) requires that a claimant request his employer=s authorization for medical services performed by any physician, including the claimant=s initial choice. *See Maguire v. Todd Shipyards Corp.*, 25 BRBS 299 (1992); *Shahady v. Atlas Tile & Marble*, 13 BRBS 1007 (1981)(Miller, J., dissenting), *rev=d on other grounds*, 682 F.2d 968 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1146 (1983). Where a claimant=s request for authorization is refused by the employer, claimant is released from the obligation of continuing to seek approval for his subsequent treatment and thereafter need only establish that the treatment he subsequently 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 Ferrari v. San Francisco Stevedoring Co.*, 34 BRBS 78 (2000); *Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *see also 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); 33 U.S.C. §907(c)(2); 20 C.F.R. §702.406.

We reject employer's contention that the administrative law judge's findings regarding claimant's request for authorization are erroneous. In his decisions, the administrative law judge concluded that employer terminated claimant's medical benefits in December 2000, that this cessation of medical benefits constituted a refusal by employer to provide medical treatment after a valid request by claimant, and that claimant was accordingly released from seeking employer's authorization for subsequent treatment. In challenging the administrative law judge's decision on appeal, employer's argument that claimant did not obtain approval for his change in physicians overlooks the fact that once claimant's request for authorization is refused by employer under Section 7(d), claimant need not continue to seek authorization for further treatment. *See Roger's Terminal*, 784 F.2d 687, 18 BRBS 79(CRT); *Anderson*, 22 BRBS 20. The record in this case indicates that claimant was initially treated at Our Lady of Lourdes Hospital on

October 17, 1999. CX 23 at 5. Upon his release from that facility, claimant was told to continue treatment with the workers' compensation physician. Claimant then treated with various physicians. CXs 26 at 4, 9; 15 at 2. Meanwhile, employer authorized claimant's treatment with Dr. Phillips, claimant's choice of physician, and claimant started treating with that physician on November 23, 1999. CXs 3 at 1; 15 at 12; 18 at 1. Employer thereafter terminated its voluntary payment of disability benefits to claimant as of May 5, 2000. CX 15 at 20. On July 24, 2000, employer filed a notice of controversion based on lack of causation, lack of medicals to substantiate future temporary total disability payments, and because prior approval of claimant's treating doctor was not obtained. CX 6. On October 20, 2000, employer filed another notice of controversion, stating "No medical evidence to substantiate disability to extent claimed on LS203." CX 9 at 1. Employer continued to pay claimant's bills for physical therapy, which was prescribed by Dr. Phillips, until October 16, 2000.[2] Claimant thereafter began consulting Dr. Reavill on May 1, 2001, EX 5 at 13, Dr. Gammel on August 23, 2001, CX 19 at 1, and Dr. Friedberg on March 12, 2002. In its brief, employer concedes that it did not pay for the services of Dr. Phillips, claimant's initial choice.[3] Thus, since employer effectively denied claimant further treatment, at the latest as of December 20, 2000, the administrative law judge's determination that claimant was not required to seek further authorization from employer, and that claimant is entitled to payment of the expenses of the physicians with whom he treated thereafter, so long as such treatment was reasonable and necessary for his injury, is rational and in accordance with law. As employer does not challenge the administrative law judge's finding that claimant's subsequent treatment with Drs. Reavil, Gammel and Friedman, which occurred after December 2000, was necessary and reasonable, the administrative law judge's finding that employer may be held liable for reimbursement of those physicians' expenses is affirmed. *See generally Anderson*, 22 BRBS 20.

Employer next alleges that claimant's failure to provide it with timely reports of treatment from Drs. Reavill, Gammel and Friedberg precludes it from having to reimburse claimant for the charges associated with their respective treatment of claimant. Under Section 7(d)(2) of the Act, an employer is not liable for medical expenses unless,

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[2] In its brief, employer avers that it made its last payment for claimant's prescribed physical therapy on December 20, 2000. *See* Emp. br. at 2.

[3] Employer presently alleges that although the administrative law judge was correct in finding that it did not pay for the services of Dr. Phillips, there is no indication in the record that it was provided with bills indicating that payment was in fact needed. *See* Emp. br. at 2. As this contention was not raised before the administrative law judge, *see* Emp. Nov. 22, 2002 post-hearing brief at 4-8, we need not address it here. *See Boyd v. Ceres Terminals*, 30 BRBS 218 (1997).

within 10 days following the first treatment, the physician rendering such treatment provides the employer with a report of that treatment. The Secretary may excuse the failure to comply with the provisions of this section in the interest of justice. 33 U.S.C. §907(d)(2); *see Roger's Terminal*, 784 F.2d 687, 18 BRBS 79(CRT); *Force v. Kaiser Aluminum & Chemical Corp.*, 23 BRBS 1 (1989), *aff'd in pert. part*, 938 F.2d 981, 25 BRBS 13(CRT) (9th Cir. 1991); 20 C.F.R. §702.422.[4] Under Section 7(d)(2) and Section 702.422(b), only the Director, through his delegates, the district directors, has the authority to make a determination as to whether a physician has shown good cause for failing to file a first report of treatment in a timely manner. *See Krohn v. Ingalls Shipbuilding, Inc.*, 29 BRBS 72 (1995)(McGranery, J., concurring in part and dissenting in part); *Toyer v. Bethlehem Steel Corp.*, 28 BRBS 347 (1994)(McGranery, J., dissenting). A decision of the district director will not be set aside unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion or not in accordance with the law. *See, e.g., Sans v. Todd Shipyards Corp.*, 19 BRBS 24 (1986).

The administrative law judge in this case found that the district director had implicitly excused any failure to timely file an attending physician's report pursuant to Section 7(d) of the Act, when the claims examiner for the Department of Labor recommended, following an informal conference which took place on August 7, 2001, that employer pay all "unpaid medical." Decision on Recon. at 4, 5-6. In rendering this determination, the administrative law judge stated that no order is necessary for either making the finding or excusing the failure to comply.[5]

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[4] The implementing regulation, Section 702.422(b), 20 C.F.R. §702.422(b), states in pertinent part:

> For good cause shown, the Director may excuse the failure to comply with the reporting requirements of the Act . . . .

[5] Employer argues that the claims examiner, who conducted the informal hearing in this case, and issued the memorandum of informal conference, does not have the authority to excuse noncompliance with this section. The district director's designee has the authority to call an informal conference, to preside over an informal conference, to evaluate evidence, and to prepare a memorandum outlining recommendations. 20 C.F.R. §§702.312-702.316 (2001). If the parties do not agree with the recommendations of the district director's designee, a party, or the district director's designee may either hold additional conferences or refer the matter to the Chief Administrative Law Judge. This process was followed in this case and the district director's designee, the claims examiner in this case issued a recommendation that employer pay the medical charges which accrued until the date of the conference. In light of our disposition of this issue,

We agree with employer that the administrative law judge's finding that the district director implicitly excused claimant's failure to comply with the reporting requirements of Section 7(d)(2) must be vacated. The Board has held that even if employer has refused treatment to a claimant, claimant must nonetheless comply with Section 7(d)(2). *See Mattox v. Sun Shipbuilding & Dry Dock Co.*, 15 BRBS 162 (1982). In the instant case, the Memorandum of Informal Conference issued on August 10, 2001, refers only to the opinions of Dr. Phillips and Dr. Leoni. Thus, the recommendation for employer to pay claimant's medicals cannot be said to apply to the charges incurred with Dr. Reavill, Dr. Gammel and Dr. Friedberg.[6] Moreover, once employer raised the issue of claimant's alleged non-compliance with the reporting requirements of Section 7(d)(2), it was incumbent upon the administrative law judge to remand the case to the district director for a finding as to whether the failure to file is excused, as the administrative law judge does not have the authority to consider whether claimant is excused from complying with the requirements of Section 7(d)(2).[7] *Toyer*, 28 BRBS 347; *see also Krohn*, 29 BRBS 72. Thus, as the district director has the authority to determine whether non-compliance with Section 7(d)(2) should be excused, we vacate the administrative law judge's finding on this issue and we remand the case to the administrative law judge. *See Toyer*, 28 BRBS at 353. On remand, the administrative law judge must remand the case to the district director to make specific findings as to whether claimant's failure to file reports of treatment by Dr. Reavill, Dr. Gammel and Dr. Friedman is excused. *See* 20 C.F.R. §907(d)(2); *Ferrari,* 34 BRBS 78.

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however, we do not need to address employer's argument that the district director himself must make a determination under this section.

[6] Claimant first saw Dr. Reavill on May 1, 2001, Dr. Gammel on August 23, 2001, and Dr. Friedman on March 12, 2002. EX 5 at13; CX 19 at 1; CX 24 at 4.

[7] In the instant case, the issue of Section 7(d) compliance was raised by employer in its post-hearing brief. *See* Employer's Post-Trial Memorandum at 7-8.

Accordingly, the administrative law judge's finding that the district director excused claimant's failure to file medical reports is vacated, and the case is remanded for consideration consistent with this opinion. In all other respects, the administrative law judge's Decision and Order Awarding Benefits and Decision and Order Denying Employer's Motion for Reconsideration are 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