

DEBBIE I. ROBINS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MATSON TERMINALS	)	DATE ISSUED: <u>FEB 17, 2005</u>
	)	
and	)	
	)	
FRANK GATES ACCLAIM	)	
	)	
Employer/Carrier-	)	
Respondents	)	DECISION and ORDER

Appeal of the Decision and Order-Partial Award of Temporary Total Disability Compensation Denial of Medical Treatment Reimbursement Claim of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

Jay Lawrence Friedheim (Admiralty Advocates), Honolulu, Hawaii, for claimant.

John R. Lacy and Randolph L. M. Baldemor (Goodsill Anderson Quinn & Stifel), Honolulu, Hawaii, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order-Partial Award of Temporary Total Disability Compensation Denial of Medical Treatment Reimbursement Claim (03-LHC-550) of Administrative Law Judge Richard T. Stansell-Gamm 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 worked for employer as a container freight station warehouseman in Hawaii since 1999. Tr. at 137. She was injured on December 12, 2001, when a four-by-four hit her in the back of her head and neck while she was bending down to pick up a block. A supervisor, who witnessed the accident, took claimant to Straub Hospital and Clinic, where she was treated by Dr. Yokochi. She was released to return to work on May 7, 2002. Claimant continued to have persistent headaches and neck pain, for which she sought treatment from Dr. Yokochi. Employer paid claimant temporary total disability compensation from December 13, 2001, until May 6, 2002, and from June 23, 2002, until August 4, 2002. CX 1 at 2; EX 7. On August 28, 2002, claimant filed a claim under the Act for injuries to her head, back and neck caused by the December 12, 2001, work accident. On August 29, 2002, employer controverted claimant's claim for additional disability compensation and medical treatment. CX 1; EXs 8, 9. On September 4, 2002, claimant saw Dr. Portner, a physiatrist.<sup>1</sup> Employer thereafter refused to pay Dr. Portner's medical bill, although it did subsequently decide to pay for claimant's visits with Dr. Yokochi through September 23, 2002.

In his decision, the administrative law judge awarded claimant temporary total disability compensation from December 13, 2001, through May 6, 2002; from June 23, 2002, through August 4, 2002; from September 3, 2002, through September 10, 2002; and from September 23, 2002, through October 27, 2002. Next, he found that regardless of whether it was claimant or employer who initially selected Dr. Yokochi, that physician became claimant's treating physician by virtue of claimant's subsequent behavior. The administrative law judge then determined that as claimant failed to obtain authorization from employer prior to her September 4, 2002, visit with Dr. Portner, employer is not liable for reimbursement to claimant for the cost of that visit.

On appeal, claimant contends that she did not choose Dr. Yokochi as her initial choice of physician; rather, claimant asserts that Dr. Portner should be considered her initial choice and that employer should be held liable for that physician's September 4, 2002 bill. Thus, the sole issue on appeal is employer's potential liability for claimant's September 4, 2002 visit with Dr. Portner.<sup>2</sup> Employer responds, urging affirmance of the administrative law judge's decision.

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<sup>1</sup> A physiatrist is an expert in physical medicine rehabilitation. Tr. at 39-40.

<sup>2</sup> After a March 26, 2003, work incident which aggravated claimant's neck pain, Decision and Order at 37, n.14, claimant returned to Dr. Portner, and employer accepted him as claimant's treating physician. Thus, as Dr. Portner saw claimant only on September 4, 2002, before the March 2003 incident, the administrative law judge concluded only this one visit was at issue. *Id.* at 40, n.18. Claimant also makes a general argument that she should be awarded additional temporary total disability benefits for days of work she missed in addition to the periods awarded by the administrative law

Section 7(b) of the Act, 33 U.S.C. §907(b), provides the employee with the right to choose an attending physician for treatment of her work-related injuries.<sup>3</sup> Section 7(c)(2) of the Act, 33 U.S.C. §907(c)(2), provides that when the employer or carrier learns of its employee's injury, it must authorize medical treatment by the employee's chosen physician. Once claimant has made her initial, free choice of a physician, she may change physicians upon obtaining prior written approval of the employer, carrier or district director. 20 C.F.R. §702.406.

Initially, we need not address claimant's argument that the administrative law judge's determination that Dr. Yokochi was claimant's treating physician was in error, as the denial of payment for Dr. Portner must be vacated on other grounds. While Section 702.406(a) of the Act's regulations provides that claimant must seek authorization if she wishes to change her choice of physicians, *see Maguire v. Todd Pacific Shipyards Corp.*, 25 BRBS 299 (1992), under Section 7(d) of the Act, claimant is required to seek authorization even for her initial free choice in order for employer to be liable for payment or reimbursement of claimant's medical expenses.<sup>4</sup> *See Shahady v. Atlas Tile & Marble Co.*, 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). However, under either scenario where a claimant's request for authorization is refused by the employer, or

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judge. Claimant, however, has failed to adequately brief this issue and to demonstrate how the administrative law judge erred in his disability findings. Decision and Order at 39-40. Thus, the disability issue will not be addressed. 20 C.F.R. §802.211.

<sup>3</sup> Section 7(b), 33 U.S.C. §907(b), states:

The employee shall have the right to choose an attending physician authorized by the Secretary to provide medical care under this chapter as hereinafter provided. If, due to the nature of the injury, the employee is unable to select his physician and the nature of the injury requires immediate medical treatment and care, the employer shall select a physician for him.

<sup>4</sup> Section 7(d)(1) provides in pertinent part:

An employee shall not be entitled to recover any amount unless expended by him for medical or other treatment or services unless--(A) the employer shall have refused or neglected a request to furnish such services and the employee has complied with subsections (b) and (c) of this section and the applicable regulations.

33 U.S.C. §907(d)(1).

where claimant has been effectively refused further treatment, claimant is released from the obligation of continuing to seek approval for her subsequent treatment and thereafter need only establish that the treatment she subsequently procured on her own initiative was necessary for her 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)(5<sup>th</sup> Cir.), *cert. denied*, 479 U.S. 826 (1986); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Pirozzi v. Todd Shipyards Corp.*, 21 BRBS 294 (1988).

The *Roger's Terminal* holding controls here. In addressing the issue of reimbursement for claimant's September 4, 2002, visit to Dr. Portner, the administrative law judge acknowledged that on August 29, 2002, employer controverted claimant's right to further disability benefits and medical treatment but found this controversion did not amount to a refusal to provide medical treatment because employer subsequently continued to pay Dr. Yokochi for his treatment of, and consultations with, claimant at least through September 23, 2002. Decision and Order at 42. *See Hunt v. Newport News Shipbuilding & Dry Dock Co.*, 28 BRBS 364 (1994), *aff'd*, No. 95-1035 (4<sup>th</sup> Cir. July 19, 1995) (unpublished); *Senegal v. Strachan Shipping Co.*, 21 BRBS 8 (1988); 20 C.F.R. §702.406(a). However, employer's notice of controversion explicitly states:

Based on the reports by [Drs.] Nakano and Kienitz, the claimant has reached a pre-incident medical status. Additionally, there is no permanent impairment and the claimant is able to return to regular duty work in relation to her work injury of 12/12/01. Therefore, future medical treatment . . . [is] controverted.<sup>5</sup>

EX 8; *see* CX 5. Employer, therefore, unequivocally stated on August 29, 2002, that it would not accept any further liability for claimant's medical treatment related to her work injury. Within a few days of this notice, claimant consulted Dr. Portner on September 4, 2002, and returned to Dr. Yokochi. Although employer thereafter resumed payment for claimant's visits with Dr. Yokochi for about a month,<sup>6</sup> at the time of the September 4,

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<sup>5</sup> Dr. Nakano reported on July 12, 2002, that "[t]he trauma that [claimant] sustained on December 12, 2001, has physiologically resolved" and that "[s]he does not need any specific medical treatment as there exists no neurologic or orthopedic residual from December 12, 2001." CX 5 at 14. Dr. Nakano stated that treatment for claimant's migraine headaches should now be her responsibility prior to medical insurance. *Id.* at 15. Dr. Kienitz, on August 15, 2000, was also of the opinion that no further treatment or diagnostic studies related to the December 2001 accident are necessary. EX 6 at 7.

<sup>6</sup> On September 23, 2002, Dr. Yokochi checked the box on his physician's report that no further treatment was required (by him). CX 4 at 51.

2002, visit to Dr. Portner claimant had no way of knowing that employer would continue to pay any medical expenses; rather, at the time of the visit, employer had refused to provide further treatment for claimant. As only the September 4, 2002, visit is at issue, the administrative law judge cannot rely on employer's decision at some point thereafter to resume liability to negate the effect of its August 29 controversion. As employer unequivocally controverted all future medical treatment as of August 29, 2002, claimant was not required to seek employer's authorization for further treatment thereafter; rather, in order to establish employer's liability for treatment subsequently received, claimant must establish that the treatment procured subsequent to August 29, 2002 was necessary for treatment of her injury. *See generally Roger's Terminal*, 784 F.2d 687, 18 BRBS 79(CRT). The issue of whether treatment is necessary, where the parties disagree, is a factual matter within the administrative law judge's authority to resolve. *See Weikert v. Universal Maritime Service Corp.*, 36 BRBS 38 (2002); *Sanders v. Marine Terminals Corp.*, 31 BRBS 19 (1997). Therefore, as the administrative law judge did not reach this issue,<sup>7</sup> we remand the case for the administrative law judge to determine whether claimant's visit to Dr. Portner on September 4, 2002, was necessary and reasonable for claimant's work-related injury.

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<sup>7</sup> The administrative law judge acknowledged that employer challenged the necessity of the evaluation, but did not fully discuss the issue. Instead, he "simply note[d]" his prior findings that claimant had continuing neck symptoms and pain through July 2003 for which Dr. Portner suggested a course of treatment. Decision and Order at 42, n.19.

Accordingly, the administrative law judge's finding that employer did not refuse further treatment for claimant's work injury is vacated, and the case is remanded to the administrative law judge for further consideration of this issue consistent with this opinion.

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