BRB No. 97-0768

CLAUDIA J. RICHARD	)	
	)	
Claimant-Petitioner	)	DATE ISSUED: _____
	)	
v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Granting Benefits and Order on Various Post-Decision Motions of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

D. A. Bass-Frazier (Huey & Leon), Mobile, Alabama, for claimant.

Paul M. Franke, Jr. (Franke, Rainey & Salloum, P.L.L.C), Gulfport, Mississippi, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order and Order on Various Post-Decision Motions (95-LHC-2250) of Fletcher E. Campbell, Jr., 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).

On September 23, 1993, claimant suffered a work-related back injury while working for employer as a shipfitter. Claimant made an initial free choice of Dr. Rutledge, an orthopedist, for treatment of her back injury. On October 22, 1993, Dr. Rutledge limited claimant to light duty work. These restrictions remained in place until January 2, 1994, when she was released for full duty. Thereafter, claimant worked continuously for the next several months. In April 1994, however, claimant alleged that she began to experience vertigo, dizziness, heart racing, and mental distress. Claimant consulted her family

physician, Dr. Isom, who referred her to Dr. Fleet, a neurologist. Dr. Fleet diagnosed claimant as suffering from anxiety and depression, and took her off work on several occasions. After Dr. Fleet released claimant to return to work in June 1994, she worked for several weeks, but thereafter took a leave of absence. In July 1994, on the advice of her sister, claimant consulted Dr. Harrold, a psychiatrist, who immediately pulled her out of work. Claimant received extensive treatment from Dr. Harrold thereafter for chronic pain syndrome, major depression, and panic disorder. Employer voluntarily paid claimant temporary total disability compensation from November 12, 1993 through November 14, 1993, and $4,102.96 for medical expenses related to her orthopedic care. Claimant, who has not worked since Dr. Harrold took her off work in July 1994, sought temporary total disability benefits and past and future medical benefits for the treatment provided by Drs. Isom, Fleet and Harrold for her psychiatric condition, which she alleged resulted from her work-related back injury.

In his Decision and Order, the administrative law judge found that claimant's psychiatric injury was work-related and awarded her continuing temporary total disability compensation commencing September 23, 1993. The administrative law judge, however denied medical benefits for the treatment provided by Drs. Fleet, Isom, and Harrold, finding that claimant had not sought employer's prior authorization for this treatment as is required under Section 7(d)(1), 33 U.S.C. §907(d)(1), and 20 C.F.R. §702.406. In addition, the administrative law judge found that these physicians had not provided employer with a timely first report of treatment within 10 days as is required under Section 7(d)(2), 33 U.S.C. §907(d)(2), and noted that while the failure to do so may be excused by the district director, claimant had not obtained such an excuse.[1] In response to motions for reconsideration filed by both employer and claimant, the administrative law judge modified his initial award to reflect that claimant was entitled to temporary partial disability compensation from October 22, 1993 to January 2, 1994, and continuing temporary total disability compensation commencing July 5, 1994.[2] In addition, he rejected claimant's

[1]Stating in the body of his Decision and Order that he believed that it would be in the interest of justice to excuse claimant's failure to comply with this provision, but that only the district director had the authority to do so, the administrative law judge noted in a footnote that neither the Act nor the regulations impose a deadline for obtaining this excuse, and suggested that perhaps this option remained available to claimant. Decision and Order at 14 n. 7

[2]Inasmuch as employer does not appeal the award of disability benefits, it is affirmed.

motion for reconsideration, and reaffirmed his prior denial of medical benefits.

Claimant appeals, arguing that the administrative law judge erred in failing to hold employer liable for Dr. Harrold's psychiatric treatment subsequent to September 9, 1994, because she requested authorization for this treatment in a letter on this date, and employer thereafter refused to provide the same. Claimant asserts that inasmuch as the administrative law judge found Dr. Harrold's treatment to be reasonable and necessary,[3] and subsequent to the administrative law judge's decisions the district director determined that it was in the interests of justice to excuse her failure to comply with the ten-day filing requirement of Section 7(d)(2), employer is liable for the psychiatric care provided by Dr. Harrold as of September 9, 1994. Employer responds, urging affirmance.

Section 7(a) of the Act, 33 U.S.C. §907(a) states that "[t]he employer shall furnish medical, surgical, and other attendance or treatment for such period as the nature of the injury or the process of recovery may require." *See Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993). 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) requires that a claimant request her 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). Where a claimant's request for authorization is refused by the employer, however, 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 Schoen v. U. S. Chamber of Commerce,* 30 BRBS 112 (1996); *Anderson v. Todd Shipyards Corp*., 22 BRBS 20 (1989). Employer is required to consent to a change in physician where claimant's initial free choice was not that of a specialist whose services are necessary for the treatment of the compensable injury. *See generally Armfield v. Shell Offshore, Inc.*, 25 BRBS 303 (1992) (Smith, J., dissenting on other grounds); 20 C.F.R. 702.419. Section 7(d)(2) of the Act states that an employer is not liable for medical expenses unless, within 10 days following the first treatment, the physician rendering such treatment provides the employer with a report of that treatment. *See* 33 U.S.C. §907(d)(2) (1994). However, in the interest of justice, the Secretary may excuse the failure to comply with the provisions of this section. *See generally Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79 (CRT)(5th Cir. 1986), *cert. denied*, 479 U.S. 826 (1986); *Force v.*

[3]The administrative law judge stated that the treatment provided by Dr. Harrold was necessary and appropriate and that this made it all the more regrettable that for largely technical reasons, he was compelled to find the care not compensable. Decision and Order at n.5. The administrative law judge did not address the necessity of the treatment provided by Drs. Fleet and Isom in light of his finding that this treatment ceased long ago. Claimant's arguments on appeal are limited to the compensability of Dr. Harrold's psychiatric treatment after September 9, 1994.

Kaiser Aluminum & Chemical Corp., 23 BRBS 1 (1989), *aff'd in pert. part*, 938 F.2d 981, 25 BRBS 13 (CRT)(9th Cir. 1991).

As discussed previously, the administrative law judge found that Dr. Harrold's medical treatment was not compensable in light of claimant's failure to request employer's prior authorization.[4] Contrary to claimant's argument that it constituted an authorizational request, the administrative law judge found that the September 9, 1994, letter was merely notification to employer of Dr. Harrold's involvement and thus did not obligate employer to pay for these medical benefits. The administrative law judge's determination is not supported by the evidence of record. The September 9, 1994, letter, clearly evidences claimant's request for treatment by Dr. Harrold. The letter states, in relevant part:

> This letter is to advise the Employer and the Department of Labor that **in compliance with § 7** the Claimant is choosing Dr. Fleet as her treating neurologist, Dr. James Harrold as her treating psychiatrist, and Dr. Guy Rutledge, III as her treating orthopedic surgeon. Further, that this claim is for the physical injuries as well as the psychological injuries that the claimant has suffered as a result of the September 23, 1993, injury.

[4]In making this determination, the administrative law judge acknowledged that Dr. Harrold attempted to seek authorization from Dr. Rutledge, claimant's treating orthopedist, but that authorization was not forthcoming.

Claimant's Exhibit 10 at 2 (emphasis added). Inasmuch as the letter states that claimant is choosing Dr. Harrold as her treating psychiatrist "in compliance with §7," and Section 7 contains both a pre-authorization requirement and a requirement that employer consent to a change in physician where, as here, claimant's initial free choice was not that of a specialist whose services are necessary for the treatment of the compensable injury, *see* Section 7(c)(2) and 20 C.F.R. §702.419, this letter cannot be construed as inadequate to request authorization. There is no notification requirement in Section 7 other than that involved in requesting authorization. Thus, the statement advising the employer and Department of Labor "in compliance with Section 7" of claimant's choice of physicians and stating the injuries claimed is necessarily a request for authorization, as that request is the notification required for compliance with Section 7.[5] In addition to this letter, moreover, claimant's claim, filed the same date as counsel's letter, sought medical benefits for Dr. Harrold's treatment. Accordingly, we vacate the administrative law judge's findings with regard to the September 9, 1994 letter, and hold that this letter constitutes a request for authorization for treatment as a matter of law.

As discussed previously, an employee is entitled to recover medical benefits under

[5]The administrative law judge stated "notification does not constitute an authorization request," citing *Schoen v. U.S. Chamber of Commerce,* 30 BRBS 112, 113 (1996), and *Shahady v. Atlas Tile & Marble*, 682 F.2d 968 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1146 (1983). The decision in *Schoen*, 30 BRBS at 113, however, states that "employer's mere knowledge of claimant's pain does not create an obligation to pay for medical care in the absence of a request for treatment," citing *Shahady. Shahady* also does not discuss notification, but accepted the Board's holding that claimant must request that employer provide treatment in order to be entitled to medical benefits even for treatment by his initial free choice of physician. *See Shahady v. Atlas Tile & Marble*, 13 BRBS 1007 (1989) (Miller, J., dissenting), *rev'd on other grounds,* 682 F.2d 968 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1146 (1983). While employer's knowledge of an injury is not sufficient, *see Shahady,* 13 BRBS at 1010, the cited cases thus do not support the conclusion that the letter here is inadequate.

Section 7(d) if she requests employer's authorization for treatment, the employer refuses the request, and the treatment thereafter procured on the employee's own initiative is reasonable and necessary. *See Schoen,* 30 BRBS at 113; *Anderson,* 22 BRBS at 23. In the present case, because the administrative law judge found that claimant had not requested authorization for Dr. Harrold's treatment, he did not reach the issue of whether employer refused claimant's request. Remand for him to do so is not necessary on the facts presented, as the record reflects that employer's only response to claimant's September 9, 1994, letter and his claim requesting psychiatric treatment was the filing of its notice of controversion on September 24, 1994, in which it disputed liability for these expenses. Employer's Exhibit 3. Employer thus refused to provide the requested treatment. Accordingly, employer is liable for the treatment claimant procured on her own initiative from Dr. Harrold subsequent to September 9, 1994, as the administrative law judge found it was necessary and appropriate for claimant's care.

The administrative law judge also stated that the claim for these medical expenses was precluded by Dr. Harrold's failure to file a timely first notice of treatment within 10 days pursuant to Section 7(d)(2), properly noting that claimant could be excused from this requirement by the district director. The district director granted claimant an excuse from this requirement subsequent to the issuance of the administrative law judge's decisions.[6] Inasmuch as claimant requested authorization for Dr. Harrold's psychiatric treatment on September 9, 1994, and was refused authorization by employer, we vacate the administrative law judge's finding that claimant is not entitled to medical benefits for this treatment. On remand, inasmuch as the administrative law judge previously determined that the treatment provided by Dr. Harrold was necessary and appropriate, he must determine the reasonableness of the charges incurred and enter an appropriate award of medical benefits. *See generally Schoen,* 30 BRBS at 114; *Kelley v. Bureau of National Affairs*, 20 BRBS 169, 172 (1988).

Accordingly, the administrative law judge's Decision and Order Granting Benefits and Order on Various Post-Decision Motions are affirmed in part and vacated in part, and this case is remanded for the administrative law judge to enter an award of medical benefits for the treatment Dr. Harrold provided subsequent to September 9, 1994, to the extent that he finds the charges incurred are reasonable.

---

[6]While employer argues that our consideration of the district director's order is improper because it was not a part of the record before the administrative law judge, we disagree; as this order is relevant and is a matter of public record, it is properly the subject of judicial notice. *See generally Win-Tex Products Inc. v. U.S.*, 829 F. Supp. 1349 (Ct. Int'l Trade 1993). Moreover, employer's argument that the district director lacked the authority to enter the excuse is rejected for the reasons stated in *Toyer v. Bethlehem Steel Corp.*, 28 BRBS 347 (1994) (McGranery, J., dissenting). *See also Krohn v. Ingalls Shipbuilding, Inc.*, 29 BRBS 72 (1994) (McGranery, J., dissenting). In any event, the administrative law judge found that, if he had the authority to do so, he would have excused the untimely filing under Section 7(d)(2).

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge