BRB Nos. 92-2398
and 92-2398A

ROBERT ALLEN	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED:_____
INGALLS SHIPBUILDING, INCORPORATED	)	
	)	
	)	
Self-Insured	)	
Employer-Petitioner	)	
Cross-Respondent	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Additional Benefits and the Order Denying Self-Insured Employer's Motion for Reconsideration of Kenneth A. Jennings, Administrative Law Judge, United States Department of Labor.

D.A. Bass-Frazier, Mobile, Alabama, for claimant.

Paul B. Howell (Franke, Rainey & Salloum), Gulfport, Mississippi, for employer.

Before: BROWN and McGRANERY, Administrative Appeals Judges, and SHEA, Administrative Law Judge.*

PER CURIAM:

Employer appeals the Decision and Order Awarding Additional Benefits and the Order Denying Self-Insured Employer's Motion for Reconsideration, and claimant cross-appeals the Decision and Order Awarding Additional Benefits (90-LHC-2947) of Administrative Law Judge Kenneth A. Jennings 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. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5) (1988).

On June 1, 1987, while walking to the job site carrying an air hose, claimant, a spray painter, tripped on tubing on a flight of steps and injured his left knee. He reported the injury immediately to his supervisor and was sent to the shipyard hospital. Tr. at 16-17. Dr. Enger, claimant's chosen physician,[1] treated claimant conservatively until surgery became necessary, and then released him to return to work on February 1, 1988. Tr. at 18-20; Emp. Ex. 12. Claimant testified he was unable to work more than a few hours on February 1, 1988, so he went to the hospital to see Dr. Enger, who treated claimant and sent him home.[2] In April 1988, of his own volition, claimant consulted Dr. Meyer, who referred him to Dr. Fondren, a board-certified orthopedic surgeon. Dr. Fondren treated claimant, performed arthroscopic surgery on June 1, 1988, prescribed exercises, and released claimant to return to work on July 5, 1988. Claimant has worked for employer since that time at his regular job and wages. Tr. at 23-24, 43-45; Cl. Ex. 6.

Based on Dr. Enger's February 1, 1988 release, employer, on February 2, 1988, suspended its voluntary payments of compensation to claimant.[3] Cl. Ex. 3; Emp. Ex. 5. On February 4, 1988, claimant filed a claim for additional compensation. Cl. Ex. 1; Emp. Ex. 6. On February 17, 1988, employer filed a duplicate notice of suspension of payments, and on February 22, 1988, employer filed its formal notice of controversion. Cl. Exs. 2-3; Emp. Exs. 5, 8.

A hearing was held on June 12, 1991, wherein the parties disputed the nature and extent of disability, average weekly wage, interest, medical benefits, costs, fees, and the applicability of Section 14(e), 33 U.S.C. §914(e). Decision and Order at 2. The administrative law judge awarded claimant temporary total disability benefits based on an average weekly wage of $480.40, past and future medical benefits, and interest, and he assessed a Section 14(e) penalty against employer.[4] Decision and Order at 7-9, 11. The administrative law judge thereafter denied employer's motion for reconsideration. Order at 1-2. On appeal, employer challenges the administrative law judge's findings on the issues of medical benefits and Section 14(e). Claimant responds, urging affirmance.

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[1]Although the parties disputed this issue and the administrative law judge did not initially so find, on reconsideration, he acknowledged Dr. Enger as claimant's physician of choice. Order at 2; substitute Emp. Ex. 2.

[2]According to counsel, claimant was off work from February 1 through March 5, 1988 on Dr. Enger's orders. Tr. at 45.

[3]Employer paid temporary total disability benefits from February 6, 1987 until February 1, 1988, based upon an average weekly wage of $433.11. 33 U.S.C. §908(b); Cl. Ex. 3.

[4]The administrative law judge awarded temporary total disability benefits from June 2, 1987 through February 1, 1988, February 1 through March 6, 1988, and June 1 through July 5, 1988. Because he found employer paid benefits from June 2, 1987 through February 1, 1988 based on an incorrect average weekly wage, the administrative law judge awarded claimant a Section 14(e) penalty on the difference between the compensation rates. He also assessed a Section 14(e) penalty on benefits due February 1 through February 17, 1988. Decision and Order at 10, 12.

BRB No. 92-2398. In his cross-appeal, claimant challenges the administrative law judge's calculation of his average weekly wage, and employer responds, urging affirmance. BRB No. 92-2398A.

Section 14(e)

Employer initially contends the administrative law judge erred in assessing a Section 14(e) penalty against it. In support of this contention, employer argues it is not liable for a Section 14(e) penalty on benefits from June 2, 1987 through February 17, 1988 because the administrative law judge found its LS-208 Notice of Suspension of Compensation, dated February 17, 1988, to be the equivalent of a notice of controversion, and because this February 17 document is a duplicate of a form filed on February 2, 1988. Further, employer disputes the existence of a controversy until it suspended claimant's payments on February 2, 1988. Alternatively, employer argues that its Notice of Voluntary Payment (LS-206 form), which was filed on August 2, 1987, is the equivalent of a notice of controversion, as it implicitly controverts any amount of average weekly wage other than the one identified on the form. Consequently, in the alternative, employer contends it is only liable for a Section 14(e) penalty from June 2, 1987 to August 2, 1987.

Section 14(e) of the Act, 33 U.S.C. §914(e), provides that if an employer fails to pay any installment of compensation voluntarily within 14 days after it becomes due, the employer is liable for an additional 10 percent of such installment, unless it files a timely notice of controversion under Section 14(d), 33 U.S.C. §914(d), or the failure to pay is excused by the district director after a showing that, owing to conditions beyond its control, the employer could not pay such installment within the prescribed period. Where an employer timely pays compensation but later suspends payments, the employer will be liable for additional compensation under Section 14(e) unless it files a notice of controversion within 14 days after a controversy between the parties arises. *Ramos v. Universal Dredging Corp.*, 15 BRBS 140 (1982); *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649 (1979); 33 U.S.C. §914(d). A notice of controversion must contest the right to compensation, and it must include the grounds on which the controversion is based. 33 U.S.C. §914(d); 20 C.F.R. §702.251.

In the instant case, on August 2, 1987, employer filed a notice of voluntary payment without an award (Form LS-206).[5] On February 2, 1988, the day after its last payment of voluntary benefits to claimant, employer filed a notice of suspension of payments (Form LS-208), citing claimant's return to work as its reason for suspension. On February 17, 1988, employer filed a duplicate notice of suspension, and on February 22, 1988, it filed a notice of controversion (Form LS-207). *See* Cl. Exs. 1-3; Emp. Exs. 5-6, 8. The administrative law judge found that employer's February 17, 1988 notice of suspension in this case is the functional equivalent of a notice of controversion and that employer is thus liable for a penalty on the unpaid benefits prior to that date. Decision and Order at 10.

It is undisputed that employer's formal Notice of Controversion, which was filed on February 22, 1988, is untimely, as it was filed twenty-one days after the controversy arose. 33 U.S.C. §914(e). Employer contends, however, that its August 2, 1987, LS-206 form and its February 2, 1988, LS-208 form are equivalent to a notice of controversion. Although a notice of controversion need not be labelled a "Notice of Controversion," and may in fact be another form, it must contain the information pertinent to a controversion of the case. *See White v. Rock Creek Ginger Ale Co.*, 17 BRBS 75 (1985). Under the Act, the purposes of Section 14(e) are to encourage employers to promptly pay benefits and to act as an incentive to induce employers to bring any compensation disputes to the attention of the Department of Labor. *See Benn v. Ingalls Shipbuilding, Inc.*, 25 BRBS 37 (1991), *aff'd sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP*, 976 F.2d 934, 26 BRBS 107 (CRT) (5th Cir. 1992). An LS-206 form is used to show acceptance of a claim by paying benefits without an award. Employer's LS-206 form in this matter satisfies that purpose and contains no reference to or implication of a controversy. Emp. Ex. 4. Consequently, employer's argument that its LS-206 form implicitly disputes any average weekly wage except the one shown is unsubstantiated, and we reject it. 33 U.S.C. §914(d).

Employer additionally asserts that its LS-208, dated February 2, 1988, constitutes the timely equivalent of a notice of controversion since the administrative law judge rationally determined that a duplicate LS-208, dated February 17, 1988, was the equivalent of a notice of controversion. We agree. The Board has held that a "timely notice of suspension which provides the reason for suspension serves the purpose of Section 14(e). . . ." *White*, 17 BRBS at 79. The evidence of record supports the administrative law judge's finding that employer's February 17, 1988, notice of suspension is the equivalent of a notice of controversion, as that notice states the reason for the suspension of compensation and contains the other information necessary to controvert the claim. *See* Emp. Ex. 5, p.2.; *White*, 17 BRBS at 79. Moreover, employer filed its original notice of suspension on February 2, 1988, *see* Emp. Ex. 5, p.1, the date after claimant was released to work

[5]Initially, employer is correct in asserting there was no controversy during the period of voluntary payment between June 2, 1987 and February 1, 1988 in this case; however, an employer may be liable for a Section 14(e) penalty on the difference between the award and the voluntary payments it made where a notice of controversion was not filed in a timely manner. *Hearndon v. Ingalls Shipbuilding, Inc.*, 26 BRBS 17, 21 (1992); *see also Lorenz v. F.M.C. Corp., Marine & Rail Div.*, 12 BRBS 592, 595 (1980).

and employer suspended payments. As the February 2, 1988, notice contains information identical to the February 17, 1988, notice, *compare* Emp. Ex. 5, p.1 to Emp. Ex. 5, p.2, we hold that prior notice is also the functional equivalent of a notice of controversion. Thus, as the February 2, 1988, notice of suspension was filed within 14 days of the cessation of payments, it was timely; accordingly, we reverse the administrative law judge's determination that employer is liable for a Section 14(e) penalty on unpaid benefits due claimant for the period June 2, 1987 through February 17, 1988.

Section 7 - Medical Benefits

Employer next contends the administrative law judge erred in awarding medical benefits to claimant for those services rendered by doctors other than Dr. Enger, as Dr. Enger is claimant's physician of choice and is the only doctor authorized by employer. Further, employer disputes the reasonableness and necessity of the medical treatment given by Drs. Fondren, Goldstein, and Meyer, contending such treatment was merely duplicative of Dr. Enger's efforts. Claimant responds, arguing that Dr. Enger is actually "employer's doctor" because employer formed a relationship with him and wholly adopted his conclusions. Additionally, claimant maintains he sought, and was denied, authorization from employer for Dr. Meyer's services.

In this case, claimant signed a choice of physician form on June 1, 1987, selecting Dr. Enger. Substitute Emp. Ex. 2; Emp. Ex. 12. In April 1988, because he felt his condition had not improved, claimant consulted Dr. Meyer, who subsequently referred claimant to Dr. Fondren. Dr. Fondren treated claimant conservatively until June 1, 1988, when he and Dr. Goldstein performed an exploratory arthroscopy on claimant's knee and noted arthritic changes in the patella. Tr. at 21-24; Cl. Ex. 6; Emp. Ex. 13. On June 3, 1988, claimant requested employer's authorization to substitute Dr. Meyer for Dr. Enger as his treating physician, attaching medical records and bills as supporting documentation. Emp. Ex. 14. Employer, on June 6, 1988, denied both the request for authorization and liability for the submitted expenses. Emp. Ex. 15.

Subsequently, on June 26, 1988, Dr. Goldstein confirmed the diagnosis of degenerative changes in the articular cartilage. Emp. Ex. 16. Dr. Enger re-examined claimant in August 1988 and, after concluding that claimant's condition had reached maximum medical improvement with no residual disability, agreed with Dr. Fondren's finding regarding the arthritic changes to the patella. Emp. Ex. 12 at 16, 20.

In his decision holding employer liable for claimant's medical expenses, the administrative law judge found that claimant is entitled to future medicals and to reimbursement for medical expenses incurred as a result of his work-related injury, including treatment received from Drs. Meyer and Fondren and Dr. Fondren's associates. The administrative law judge noted that, although Dr. Fondren performed only exploratory surgery, his treatment proved successful in returning claimant to work. Further, he noted that Dr. Enger agreed with the diagnoses of Drs. Fondren and Goldstein. Therefore, the administrative law judge credited Dr. Fondren's opinion and determined that the treatment claimant received from Drs. Fondren, Goldstein and Meyer was reasonable and

necessary. Decision and Order at 11.

Section 7 of the Act, 33 U.S.C. §907, describes an employer's duty to provide medical services necessitated by its employee's work-related injuries. Section 7(d), 33 U.S.C. §907(d), sets forth the prerequisites for an employer's liability for payment or reimbursement of medical expenses incurred by a claimant. The Board has held that Section 7(d) requires a claimant to request authorization for medical services performed by any physician, including the initial choice and any change thereafter. *Maguire v. Todd Pacific 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); 20 C.F.R. §702.406(a). 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; thereafter, in order to be entitled to such treatment at his employer's expense, the claimant need only establish that the treatment he subsequently procured was necessary for his injury. *Ranks v. Bath Iron Works Corp.*, 22 BRBS 301 (1989); *White v. Dresser Guiberson Pumping*, 22 BRBS 87 (1989); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989).

In the instant case, employer does not challenge its liability for the medical charges of Dr. Enger. Rather, employer alleges that it should not be held liable for the charges of claimant's subsequent physicians. A review of the record reveals that claimant did not request authorization for medical services or a change of physician until June 3, 1988; thus, claimant procured the services of Drs. Fondren, Goldstein and Meyer while still under the care of Dr. Enger and prior to requesting authorization. As claimant obtained medical care from a physician other than his initial choice, prior to any request for authorization, we reverse the award of medical benefits for those services received from doctors other than Dr. Enger between April 4 and June 6, 1988.[6] *See Ranks*, 22 BRBS at 308. For services rendered after June 6, 1988, we affirm the award of medical benefits, as employer's denial of claimant's June 3, 1988, request relieved claimant of his obligation to seek continuing approval for his subsequent treatment, and the administrative law judge found that the post-June 6, 1988 services were reasonable and necessary.[7] *Anderson*, 22 BRBS at 23.

Average Weekly Wage

In his cross-appeal, claimant contends that the administrative law judge's average weekly wage calculation pursuant to Section 10(a) was erroneous. We disagree. Section 10(a) is to be

[6]Claimant's first appointment with Dr. Meyer was on April 4, 1988, and employer responded negatively to claimant's request for authorization on June 6, 1988.

[7]In that no relationship exists between employer and Dr. Enger because claimant selected Dr. Enger of his own volition, we reject claimant's argument that Dr. Enger is "employer's physician." *Slattery Associates, Inc. v. Lloyd*, 725 F.2d 780, 785, 16 BRBS 44, 51 (CRT) (D.C. Cir. 1984) (A doctor is not an "employer's physician" unless there is such a relationship between the employer and the doctor that it is reasonable the employer would adopt the doctor's medical conclusions.).

applied when an employee worked "substantially the whole of the year" immediately preceding his injury.[8] 33 U.S.C. §910(a); *see Gilliam v. Addison Crane Co.*, 21 BRBS 91 (1987). To determine a claimant's average annual earnings under Section 10(a), his average daily wage is multiplied by 260 (for a five-day-per-week worker), and the resulting figure is divided by 52, pursuant to Section 10(d), 33 U.S.C. §910(d), in order to yield claimant's statutory average weekly wage. *See O'Connor v. Jeffboat, Inc.*, 8 BRBS 290 (1978). Thus, Section 10(a) seeks to approximate claimant's annual earnings; time lost due to strikes, personal business, illness or other reasons is therefore not deducted from the computation. *See Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340, 343 n.4 (1992); *Duncan v. Washington Metropolitan Area Transit Authority*, 24 BRBS 133, 136 (1990).

In the instant case, the administrative law judge calculated claimant's average daily wage by dividing claimant's yearly earnings, $18,615.10, by the number of hours claimant worked, 1,550.1, and multiplying the resulting figure by 8, thus yielding an average daily wage of $96.08. The administrative law judge proceeded to multiply this average daily wage by 260; the resulting figure, $24,980.80, was then divided by 52 to yield a statutory average weekly wage of $480.40. *See* Decision and Order at 9. In contesting this computation, claimant argues that only his regular hours, 1,446.1, or his actual days, 174, should be used to calculate average daily wage.[9] We reject claimant's contention, as the Board has previously recognized that, since average weekly wage includes vacation pay in lieu of vacation, time taken for vacation is considered part of an employee's time of employment.[10] *Duncan*, 24 BRBS at 136. We hold that the result reached by the administrative law judge under Section 10(a) is supported by substantial evidence and rationally approximates claimant's annual earnings; we therefore affirm the administrative law judge's finding that claimant's average weekly wage at the time of his injury was $480.40. *See O'Connor*, 8 BRBS at 290.

Accordingly, the administrative law judge's Decision and Order Awarding Additional Benefits and Order Denying Self-Insured Employer's Motion for Reconsideration are reversed with regard to employer's liability for a Section 14(e) penalty, and employer's liability for the medical expenses accrued by claimant between April 4 and June 6, 1988. In all other respects, the administrative law judge's Decision and Order Awarding Additional Benefits and Order Denying Self-Insured Employer's Motion for Reconsideration are affirmed.

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[8]As neither party challenges the administrative law judge's use of Section 10(a) to calculate claimant's average weekly wage, the administrative law judge's use of that subsection is affirmed.

[9]Thus, claimant submits his correct average weekly wage is either $534.90 or $514.80.

[10]Because vacation and other types of pay are included in the calculation of earnings, claimant's wage would be inflated were we to exclude the time for which those amounts were paid. *See, e.g., Sproull v. Stevedoring Services of America*, 25 BRBS 100 (1991) (holiday and vacation pay); *Duncan*, 24 BRBS at 136 (vacation pay & vacation days); *Hatchett v. Duncanson-Harrelson Co.*, 11 BRBS 436 (1979), *aff'd in relevant part sub nom. Duncanson-Harrelson Co. v. Director, OWCP*, 644 F.2d 827, 13 BRBS 308 (9th Cir. 1981) (overtime pay).

SO ORDERED.

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JAMES F. BROWN
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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ROBERT J. SHEA
Administrative Law Judge