BRB Nos. 91-2150
and 91-2150A

MAURICE THOMPSON	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
PADUCAH MARINE WAYS	)	DATE ISSUED:
	)	
and	)	
	)	
MIDLAND INSURANCE COMPANY	)	
	)	
Employer/Carrier-	)	
Respondents	)	
Cross-Petitioners	)	DECISION AND ORDER

Appeal of the Decision and Order on Remand of Lawrence E. Gray, Administrative Law Judge, United States Department of Labor.

J. William Phillips, Murray, Kentucky, for claimant.

William E. Pinkston (Denton & Keuler), Paducah, Kentucky, for employer/carrier.

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

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order on Remand (85-LHC-426) of Administrative Law Judge Lawrence E. Gray awarding benefits 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).

This case is before the Board for a second time. While employed by employer as a welder, claimant suffered injuries to his back in 1972, 1976, 1978 and 1979. After each injury, claimant received medical treatment and was later released to return to work. Claimant continued to experience soreness in his back but maintained his job with employer until he was laid-off in 1983.

Employer subsequently closed down its operation. Claimant worked at other employment until January 1984, when his back pain increased and he was unable to carry on any further work or household activities. Dr. Marrese diagnosed a herniated disc as a result of the job injuries of 1976 and 1978, and performed a partial hemilaminectomy in September 1984. Claimant filed this claim for temporary total disability benefits on June 12, 1984, alleging that his back problems are causally related to the back injuries he suffered at work.

In his original Decision and Order, the administrative law judge found that employer failed to rebut the Section 20(a), 33 U.S.C. §920(a), presumption that there is a causal relationship between claimant's 1978 injury and his work. The administrative law judge concluded that claimant was temporarily totally disabled from January 28, 1984, and continuing, as a result of the work-related injury of July 1978 as aggravated by the September 1979 injury. The administrative law judge further found that the claim was timely filed, that claimant's average weekly wage at the time of his 1983 employment was $322.59, and further ordered employer to pay claimant's medical expenses.

Employer appealed this decision to the Board. In its Decision and Order, the Board affirmed the administrative law judge's finding that the claim was timely filed, but vacated the administrative law judge's average weekly wage determination and remanded for a determination of claimant's average weekly wage based on his wages at the time of injury. The Board also vacated the administrative law judge's order that employer pay for claimant's medical services, and remanded the case for further findings on this issue inasmuch as the administrative law judge did not consider whether claimant complied with the requirements of Section 7(d) of the Act, 33 U.S.C. §907(d). *Thompson v. Paducah Marine Ways*, BRB No. 86-1905 (March 31, 1989).

The Board denied employer's motion for reconsideration of the holding that the claim was timely filed. The Board granted claimant's motion for reconsideration of the issues of the determination of time of injury for purposes of calculating average weekly wage and whether claimant complied with the requirements of Section 7(d), but affirmed its decision. *Thompson v. Paducah Marine Ways*, BRB No. 86-1905 (Nov. 28, 1989) (order *en banc)*. The Board held that since claimant sought benefits for disability as of June 12, 1984, due to traumatic injuries rather than to an occupational disease, and since the administrative law judge determined that claimant suffered a work-related injury on July 11, 1978, which was aggravated by a September 10, 1979, injury, on remand, the administrative law judge should base his determination of claimant's average weekly wage as of September 10, 1979, the date of claimant's last work-related injury which aggravated his condition. In addition, the Board declined to consider the significance of claimant's correspondence with employer in 1984, as the administrative law judge had not considered whether the requirements of Section 7(d) were met.

On remand, the administrative law judge found that the uncontroverted evidence establishes claimant's average weekly wage on September 10, 1979, as $263.02. *See* Decision and Order on Remand at 1; Emp. Ex. 4. The administrative law judge also found that employer had authorized medical attention for the September 1979 injury, that claimant's wife telephoned a request for permission for examination and treatment by Dr. Marrese in 1984, and that employer's silence was, in effect, a refusal or neglect to provide treatment.[1]

On appeal, claimant contends that the administrative law judge erred in determining the date of injury for purposes of calculating his average weekly wage. Employer responds, urging affirmance of the administrative law judge's finding on this issue. On cross-appeal, employer contends that the administrative law judge erred in finding employer liable for payment of claimant's medical bills. Claimant responds, urging affirmance.

Claimant contends that the administrative law judge erred in determining the date of injury for purposes of calculating his average weekly wage. Specifically, claimant contends that herniation of a disc is not an accidental injury, but an occupational disease, and that his last date of employment, September 30, 1983, prior to his awareness of the true nature of his condition, *i.e.*, that he has an herniated disc due to the work injuries, should be considered the time of injury for average weekly wage purposes. We decline to address this contention, as the Board's Order on Reconsideration held the time of injury for average weekly wage purposes to be September 10, 1979. That decision is the law of the case, and we need not reexamine this issue. *See Wayland v. Moore Dry Dock*, 25 BRBS 53 (1991); *Brocklehurst v. Giant Food, Inc.*, 22 BRBS 256 (1989).

Moreover, subsequent to the issuance of the Board's Order on Reconsideration in this case, in addressing a case in which the claimant had suffered a number of work-related back injuries and was eventually diagnosed as suffering from lumbar stenosis, the Board reversed an administrative law judge's holding that lumbar stenosis is an occupational disease. *Steed v. Container Stevedoring Co.*, 25 BRBS 210 (1991). The Board held that the work-related walking and standing that aggravated the claimant's lumbar stenosis were not peculiar to claimant's employment, and held that as a matter of law, the claimant sustained a gradual work-related accidental injury.[2] *See Steed*, 25 BRBS at 215; *see also Gencarelle v. General Dynamics Corp.*, 22 BRBS 170 (1989), *aff'd*, 892 F.2d 173, 23 BRBS 13 (CRT)(2d Cir. 1989).

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[1]The administrative law judge also found that claimant's request for permanent benefits must be made in a petition for modification pursuant to Section 22 of the Act, 33 U.S.C. §922.

[2]Generally, there are two characteristics of an occupational disease: 1) an inherent hazard of continued exposure to conditions of a particular employment; and 2) gradual rather than sudden onset. 1B A. Larson, *Workmen's Compensation Law* §41.31 (1987); *Gencarelle v. General Dynamics Corp.*, 22 BRBS 170 (1989). The United States Court of Appeals for the Second Circuit has essentially broken the first element into two subelements - "hazardous conditions" that are "peculiar to" one's employment as opposed to other employment generally. *Gencarelle v. General Dynamics Corp.*, 892 F.2d 173, 23 BRBS 13 (CRT) (2d Cir. 1989).

In the present case, the administrative law judge awarded claimant temporary total disability benefits based on injuries to claimant's back suffered as a result of a work-related incident on July 11, 1978, as aggravated by the work-related injury on September 11, 1979. Based on the foregoing case law, we reaffirm the Board's holding that this is a claim for a traumatic injury rather than an occupational disease and that the time of injury for purposes of average weekly wage is the date of claimant's last work-related injury which aggravated his condition, September 10, 1979.[3] *See generally Steed*, 25 BRBS at 215. Moreover, claimant does not contest the administrative law judge's finding that his average weekly wage on September 10, 1979, was $263.02, and thus, we affirm the administrative law judge's finding that claimant's temporary total disability benefits should be based on the average weekly wage of $263.02.

On cross-appeal, employer contends that the administrative law judge erred in finding employer liable for payment of claimant's medical treatment with Dr. Marrese. The administrative law judge found on remand that Employer's First Report of Injury dated September 11, 1979, indicates that medical attention was authorized for the injury that occurred on that date. Emp. Ex. 4. The administrative law judge also found that James Causey, the general superintendent and general manager of the company at all relevant times, testified that claimant's wife had called in 1984 to tell the company that claimant was going to see the physician whose fees are in controversy. The administrative law judge rejected employer's contention that the nature of this call was to serve merely as notification and not as an attempt to seek employer's permission, and he found that employer did not act upon this information. The administrative law judge found that employer's silence was, in effect, a refusal or neglect to provide treatment, and he held employer liable for the services of Dr. Marrese.

Initially, we agree with employer's contention that the authorization dated 1979 was for a specific event and did not continue indefinitely. Employer has a continuing obligation to pay an injured employee's medical expenses. *Colburn v. General Dynamics Corp.*, 21 BRBS 219 (1988). Once claimant has made his initial, free choice of a physician, he may change physicians only upon obtaining prior written approval of the employer, carrier or district director. 33 U.S.C. §907(c)(2); 20 C.F.R. §702.406. Employer is ordinarily not responsible for the payment of medical benefits if claimant fails to obtain the required authorization. *See* 20 C.F.R. §702.421. However, failure to obtain authorization for a change can be excused where employer has effectively refused claimant further medical treatment. *Pirozzi v. Todd Shipyards Corp.*, 21 BRBS 294 (1988)(Feirtag, J., dissenting on other grounds). *See Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1988); 33 U.S.C. §907(d)(1)(A).

In the present case, claimant was released from the care of his treating physician, Dr. Campbell, two weeks after the September 1979, work-related back injury. Claimant did not seek

[3]*Cf. Johnson v. Director, OWCP*, 911 F.2d 247, 24 BRBS 3 (CRT)(9th Cir. 1990), *cert. denied*, 111 S.Ct. 1582 (1991) (Ninth Circuit holds average weekly wage should be calculated at the time of manifestation in latent traumatic injury cases).

medical attention again until 1984, this time with Dr. Marrese. Although employer did authorize treatment for the September 1979 injury, *see* Emp. Ex. 4, we hold that this authorization applies to claimant's initial free-choice physician, Dr. Campbell, and we reverse the administrative law judge's finding that the authorization broadly covers any and all subsequent treatment that claimant may seek for the 1979 work injury.

However, the record also contains evidence that claimant's wife called Mr. Causey to tell him that claimant was going to seek treatment from Dr. Marrese for his back condition, prior to his appointment with the physician in 1984.[4] Tr. at 120. This call was made after claimant no longer worked for employer. The administrative law judge rejected employer's contention that this telephone call was merely informational and held that this call was an "inartful" request for permission. We affirm the administrative law judge's finding as the administrative law judge is entitled to evaluate the credibility of witnesses and to draw rational inferences from the evidence presented. *See generally Sprague v. Director, OWCP*, 688 F.2d 862, 15 BRBS 11 (CRT)(1st Cir. 1982). Therefore, we affirm the administrative law judge's finding that claimant sought employer's permission before being treated by Dr. Marrese, and that employer's silence was, effectively, a refusal of further medical treatment. *See generally Parklands, Inc. v. Director, OWCP*, 877 F.2d 1030, 22 BRBS 57 (CRT) (D.C. Cir. 1989). Moreover, inasmuch as employer does not contest that the services were necessary, we affirm the administrative law judge's finding that employer is liable for the services provided by Dr. Marrese. *See Anderson*, 22 BRBS at 20.

[4]Mr. Causey testified that he thereafter called "Mr. Brown" and informed him of the telephone call. Tr. at 120. It appears that Mr. Brown worked for employer's carrier, Midland Insurance Company.

Accordingly, the Decision and Order on Remand of the administrative law judge awarding benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge