U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 16-0657

ERIC TISER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
TCB INDUSTRIES, INCORPORATED	)	
	)	DATE ISSUED: July 25, 2017
and	)	
	)	
LOUISIANA WORKERS' COMPENSATION CORPORATION	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Allain F. Hardin (Fransen & Hardin, P.L.C.), New Orleans, Louisiana, for claimant.

David K. Johnson (Johnson, Rahman & Thomas), Baton Rouge, Louisiana, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (2015-LHC-00852) 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.*, as extended by the Outer Continental Shelf Lands Act, 43 U.S.C. §1331 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

On May 21, 1996, claimant was struck in the back by a falling overhead chain hoist while working as a lead rigger for employer on a fixed platform on the Outer Continental Shelf.[1] Based on an MRI dated March 31, 1997, Dr. Russo diagnosed claimant with a contained lumbar disc herniation at L4-5 and two small disc herniations in his thoracic spine at T10-11 and T11-12. Dr. Russo limited claimant to light to medium work, imposed permanent lifting restrictions and recommendations against work in areas requiring extended crawling, stooping or kneeling, and opined that claimant's back condition was at maximum medical improvement. Dr. Russo last treated claimant on April 10, 1998, at which time he recommended that claimant continue with conservative forms of treatment. Claimant continued to treat conservatively through medical observation, medication, and pain management with Dr. Olson in 2002 and 2003, Dr. Cecil with Guardian Pain Management between 2001 and 2005, HT at 55-64, Drs. Manale and Adatto with the Orleans Orthopaedic Associates (OOA) between 2008 and 2012, CX-C 5, and with Drs. Waring and Cellestine in 2014 and 2015.

Following the injury, claimant testified that he could no longer work. HT at 74. Nonetheless, claimant stated that he would occasionally go out "shrimping" with family and friends when he needed money. *Id.* at 79. Claimant stated that on these trips he sometimes tried to perform some of the required heavy lifting and/or pulling but it resulted in intense back pain. *Id.* After the Deepwater Horizon Oil Spill, claimant rented his boat to BP for its oil cleanup operations for which he was paid $30,000. HT at 110-114. Claimant also appeared on two television programs: 1) a special on the National Geographic Channel in 2010 entitled *After the Spill The Last Catch*, in which he went shrimping to show the impact the oil spill had on the local fishing community; and 2) three episodes of a television series on the Discovery Channel in 2014 called *Beasts of the Bayou*, in which he set traps to catch an elusive werewolf-like creature called Rougarou. *Id.* at 74-79. Claimant stated that he did not perform any heavy duty work in either show.[2] *Id.*

Employer voluntarily paid claimant temporary total disability benefits from May 21, 1996 through February 20, 2004,[3] and temporary partial disability benefits from

[1]Claimant worked approximately six or seven months out of the year as a rigger and the remainder of the year as a commercial fisherman. HT at 43.

[2]Claimant alleged that "movie magic" gave only the appearance that he was performing heavy lifting in these programs and that any physical activity he performed was possible only through the use of pain medication. HT at 74-76.

[3]Employer reduced its payment of compensation to claimant from temporary total to temporary partial disability benefits based on a vocational report dated November 17,

February 21, 2004 through November 3, 2014.[4] Claimant thereafter sought additional disability and medical benefits. Employer controverted the claim. In his decision, the administrative law judge found claimant entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), that his present back condition is related to the employment incident, which employer did not rebut. The administrative law judge also found that claimant is incapable of returning to his usual employment duties with employer, and that employer did not establish suitable alternate employment. The administrative law judge determined claimant's pre-injury average weekly wage under Section 10(c), 33 U.S.C. §910(c), as $639.72, based on claimant's total earnings for employer in 1996 divided by the number of weeks he worked for employer in that calendar year. The administrative law judge awarded claimant compensation for temporary total disability from May 21, 1996 to June 23, 2003, and for continuing permanent total disability from June 24, 2003, as well as medical benefits.

On appeal, employer challenges the administrative law judge's award of disability and medical benefits. Claimant responds, urging affirmance of the administrative law judge's decision.

CAUSATION

Employer avers that: (1) the Section 20(a) presumption does not apply to claimant's current complaints of back pain; (2) the administrative law judge erred in finding it did not rebut the Section 20(a) presumption; and (3) claimant's disability is due to an intervening cause. The administrative law judge applied Section 20(a) based on claimant's credible testimony that he has back pain and the uncontroverted occurrence of the work accident in 1996 in which claimant's back was injured. Decision and Order at 11-12. The administrative law judge found that employer did not rebut the Section 20(a) presumption because there is no evidence that claimant did not injure his thoracic spine in the accident and claimant has been given work restrictions for his thoracic back condition in the years since the accident. *Id.* at 13.

2003, which identified two housekeeper positions. CX-A 8. Claimant stated that he applied for these positions but was not hired. EX 2.

[4]On June 28, 1999, claimant executed a third-party settlement with Chevron, U.S.A., Incorporated, for injuries arising out of the May 21, 1996 work accident. As a result of this settlement, claimant received a lump sum payment of $61,526.52. Employer approved the settlement and took a lien against compensation due. 33 U.S.C. §933(f), (g).

It is undisputed that claimant's thoracic spine was injured in the work accident of May 21, 1996, Decision and Order at 2, and the administrative law judge acted within his discretion in finding claimant's complaints of ongoing back pain to be credible. *See Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). The finding that claimant has ongoing problems with his back that could be related to the May 21, 1996 work accident is supported by substantial evidence. *See* CX-C 2 at 3; CX-C 4 at 2; CX-C 5. We thus affirm the administrative law judge's finding that claimant is entitled to the Section 20(a) presumption relating his present back condition to the May 21, 1996 work accident. *Ramsey Scarlett & Co. v. Director, OWCP*, 806 F.3d 327, 49 BRBS 87(CRT) (5th Cir. 2015).

Once the Section 20(a) presumption is invoked, the burden is on employer to rebut the presumption by producing substantial evidence that the injury is not related to the employment. *Ceres Gulf, Inc. v. Director, OWCP* [*Plaisance*], 683 F.3d 225, 46 BRBS 25(CRT) (5th Cir. 2012); *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999). Substantial evidence is "that relevant evidence—more than a scintilla but less than a preponderance—that would cause a reasonable person to accept the fact-finding."[5] *Plaisance*, 683 F.3d at 228, 46 BRBS at 27(CRT). Employer's burden is one of production, not persuasion, and it need only introduce medical or other evidence that claimant's condition was not caused by the work incident. *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir.), *cert. denied*, 540 U.S. 1056 (2003); *Conoco, Inc.*, 194 F.3d 684, 33 BRBS 187(CRT). If the employer rebuts the presumption, it no longer controls and the issue of a causal relationship must be resolved on the evidence of record as a whole, with claimant bearing the burden of persuasion. *Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT)*; see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

The administrative law judge found that employer did not produce substantial evidence rebutting the Section 20(a) presumption. Decision and Order at 13. The administrative law judge found that the medical evidence indicates that claimant sustained a thoracic injury as a result of the May 21, 1996 accident, which likely also caused intermittent pain in his lumbar spine. Drs. Russo, Olson, Katz and Waring each diagnosed a herniated thoracic disc relating to the work accident, CX-C 1, 4, 7, 8, with Drs. Russo and Waring also attributing claimant's lumbar spine pain to the work injury. CX-C 1, 2, 7. Drs. Manale and Adatto both tied claimant's back pain to the 1996 work incident. CX-C 5. Dr. Martin diagnosed "chronic pain syndrome with pain in the lower

[5]In *Plaisance*, the Fifth Circuit, in whose jurisdiction this case arises, stated that, in order to rebut the Section 20(a) presumption, employer must "advance evidence to throw factual doubt on the prima facie case." *Plaisance*, 683 F.3d at 231, 46 BRBS at 29(CRT).

back" due either to trauma or degeneration. EX 3. These opinions are insufficient to rebut the Section 20(a) presumption because they do not state that claimant's present condition is not due to the work accident. *See generally Newport News Shipbuilding & Dry Dock Co. v. Holiday,* 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009).

Moreover, while claimant's treatment records from OOA contain reports of subsequent non-work incidents,[6] these records also state that from the time of claimant's first visit on April 11, 2008 through September 16, 2010, claimant's diagnosis, symptoms, and treatment regimen for his thoracic condition remained the same,[7] CX-C 5, and that between 2011 and 2012, claimant continued to experience back symptoms, including thoracic pain, which was treated largely through medication. *Id.* Employer thus has not introduced substantial medical or other evidence that claimant's present condition, consisting of thoracic and lumbar spine pain, was not caused, at least in part, by the May 21, 1996 work accident. *Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000). We therefore affirm the administrative law judge's findings that employer did not rebut the Section 20(a) presumption and thus that claimant's present back condition is work-related. *Id.*

DISABILITY

Employer contends the administrative law judge erred in finding claimant is totally disabled, averring it established suitable alternate employment and the record establishes claimant has continued to work in various capacities since 1997. Where, as in this case, claimant has established a prima facie case of total disability by demonstrating his inability to perform his usual employment duties because of his injury, the burden

[6]Dr. Adatto's report documents that claimant was involved in a motor vehicle accident sometime around September 2008 but that any resulting injury "did not aggravate [claimant's] lower back." CX-C 5 at 22. On June 24, 2009, Dr. Adatto also documented "a new injury" of right elbow pain and a 100 percent lower back aggravation when claimant "fell off his boat in his yard landing on a 2 x 4 board" on May 15, 2009. *Id.* On November 18, 2009, Dr. Manale noted "[t]hree days ago, [claimant] jumped over a boat to get a rope out of the wheel" resulting in "increased muscle spasms." CX-C 5 at 18.

[7]Each report during this period contains a diagnosis of a "CLOSED FRACTURE OF DORSAL (THORACIC)" with a treatment plan including "a home exercise program, medication to alleviate symptom complaints, periodic review and evaluation." CX-C 5. Reference to the original intake report of Dr. Manale, dated April 11, 2008, states that claimant's complaints of thoracic and back pain are related to work accident. *Id.*

shifts to employer to establish the availability of suitable alternate employment.[8] In order to meet this burden, employer must establish that job opportunities are available within the geographic area in which claimant resides, which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could realistically secure if he diligently tried. *See Ceres Marine Terminal v. Hinton*, 243 F.3d 222, 35 BRBS 7(CRT) (5th Cir. 2001); *Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1998); *see also Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30(CRT) (5th Cir. 1992); *New Orleans* (*Gulfwide*) *Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156(CRT) (5th Cir. 1991).

The administrative law judge found that employer's evidence, consisting of two hotel housekeeping positions identified by its vocational counselor, Lynn Castro, in 2003, is insufficient to establish suitable alternate employment because claimant credibly testified that he tried to secure this employment but was rejected by both employers. Decision and Order at 16-17. The administrative law judge additionally found that Ms. Castro indicated that there is a lack of other suitable jobs for claimant given his illiteracy, lack of transportation, and the presence of a poor labor market where claimant lives. The administrative law judge's finding that employer did not establish suitable alternate employment via these two housekeeping positions is supported by substantial evidence and is affirmed. *Mijangos*, 948 F.2d 941, 25 BRBS 78(CRT).

Contrary to employer's next contention, claimant's post-injury "work" is insufficient to establish suitable alternate employment. Specifically, claimant's receipt of rental income for use of his boat for shrimping and for BP's oil cleanup operations is not sufficient by itself to establish suitable alternate employment or that claimant has a post-injury wage-earning capacity. *See Cutietta v. National Steel & Shipbuilding Co.*, 49 BRBS 37 (2015) (rental income which merely represents claimant's ownership interest in the property is not "earnings"); *Seidel v. General Dynamics Corp*., 22 BRBS 403 (1989) (profit from ownership is not included in determining earning capacity). In addition, while self-employment may constitute suitable alternate employment, *see Sledge v. Sealand Terminal*, 14 BRBS 334 (1981), the administrative law judge found that claimant credibly testified that "when engaged in shrimping, it was with considerable help from relatives."[9] Decision and Order at 11; *see* n. 11, *infra*. This work, therefore, is not

[8]We affirm as unchallenged on appeal the administrative law judge's finding that claimant is incapable of resuming his usual employment duties as a rigger. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

[9]Claimant stated that he occasionally "picked shrimp" but that he left the heavier work to others and would earn money from the catch for use of his boat. HT at 41-45, 80-81. Claimant also stated that he was only able to do such activities because of pain

suitable. *See generally Devor v. Dep't of the Army*, 41 BRBS 77 (2007). Furthermore, claimant's short-term stints in television do not constitute suitable alternate work because that work does not establish that claimant has an ongoing wage-earning capacity on the open market. *See generally Carter v. General Elevator Co.*, 14 BRBS 90, 97 (1981). We therefore reject employer's contentions and affirm the administrative law judge's finding that employer did not establish suitable alternate employment as it is supported by substantial evidence. Consequently, as employer did not present evidence of suitable alternate employment, we affirm the administrative law judge's award of continuing total disability benefits from May 21, 1996. *Hinton*, 243 F.3d 222, 35 BRBS 7(CRT).

AVERAGE WEEKLY WAGE

Employer contends the administrative law judge erred in calculating claimant's average weekly wage at $639.72 based solely upon his January to May 1996 earnings. Employer maintains that the administrative law judge's rationale for using claimant's 1996 earnings -- "because the record does not show his date of hire in 1995 or any reported earnings in that year" -- Decision and Order at 18, is not supported by the record. Employer asserts that it offered into evidence claimant's 1995 wage records. Employer contends claimant had an average weekly wage of $423.33 as of the date of injury, based on 38 weeks of employment in the one year preceding the May 21, 1996 work accident.[10]

Section 10(c) is used to calculate a claimant's average weekly wage when neither Section 10(a) nor Section 10(b) can reasonably or fairly be applied. *See Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 1025, 32 BRBS 91(CRT) (5th Cir. 1998); *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26(CRT) (5th Cir. 1991). The administrative law judge has broad discretion in determining average weekly wage under Section 10(c). *Staftex Staffing v. Director, OWCP* [*Loredo*], 237 F.3d 404, 34 BRBS 44(CRT), *modified on other grounds on reh'g*, 237 F.3d 409, 35 BRBS 26(CRT) (5th Cir. 2000). The object of Section 10(c) is to arrive at a sum which reasonably represents the claimant's annual earning capacity at the time of his injury. *See Gatlin*, 936 F.2d 819, 25 BRBS 26(CRT) (5th Cir. 1991); *Richardson v. Safeway Stores, Inc.*, 14 BRBS 855 (1982).

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medication and that his use of medication prevents him from crawling, bending, or stooping as a rigger, shrimper or deckhand. *Id.* at 90-91.

[10]Claimant's employment with employer encompasses the period between September 3, 1995 and May 21, 1996, but the record establishes that claimant did not work for employer in the last three months of 1995 and for three weeks in 1996. EX 7; CX-A 6.

The administrative law judge rationally chose to apply Section 10(c) in this case because claimant's work for employer was "seasonal, intermittent or discontinuous." Decision and Order at 18; *see* n. 1 *supra*

However, we cannot affirm the administrative law judge's average weekly wage calculation. The administrative law judge divided claimant's 1996 total earnings with employer, $12,884.00, by the 20.14 weeks he found claimant worked in 1996 prior to the work accident, to conclude that claimant's average weekly wage was $639.72.[11] As employer correctly contends, the administrative law judge inaccurately stated that the record does not contain claimant's earnings with employer in 1995. Both parties submitted evidence establishing that claimant worked for employer in 1995 for five consecutive weeks from September 3 through October 1, 1995. EX 7; CX-A 6. These records also indicate claimant did not work for employer from October 1, 1995 until January 1, 1996. As for 1996, the records show earnings for claimant for four weeks in both January and February, five weeks in March, two weeks in April, and two-plus weeks in May prior to the date of injury. EX 7.

As the administrative law judge did not address all the relevant evidence of claimant's pre-injury wages with employer in calculating claimant's average weekly wage, we vacate his finding that claimant's average weekly wage is $639.72 and remand for further consideration of this issue. On remand, the administrative law judge must address all the relevant evidence and calculate an average weekly wage that reasonably represents claimant's annual earning capacity at the time of his injury. *James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000).

[11]As claimant's average weekly wage is based exclusively on his pre-injury earnings with employer and it does not include claimant's other pre-injury earnings as a commercial fisherman and deckhand, claimant's post-injury earnings from shrimping are not relevant as evidence of claimant's post-injury wage-earning capacity. Claimant is, in this case, being compensated for his inability to perform his pre-injury work as a rigger and not for loss of income from his other work endeavors. Moreover, employer is not entitled to a credit for wages claimant receives post-injury. *Cooper v. Offshore Pipelines Int'l, Inc.*, 33 BRBS 46 (1999). We therefore reject employer's contention that claimant's post-injury earnings should be used to reduce claimant's disability compensation. We further note that the remedy for employer's contentions that claimant is earning more than he has admitted, and that claimant refuses to inform employer of his post-injury earnings, lies in Section 8(j) of the Act, 33 U.S.C. §908(j). *Cutietta v. National Steel & Shipbuilding Co.*, 49 BRBS 37 (2015); 20 C.F.R. §702.286.

MEDICAL BENEFITS

Employer contends that the administrative law judge erred by awarding claimant reimbursement of medical charges he incurred at OOA. Employer asserts that the administrative law judge inaccurately stated that employer's carrier did not respond to claimant's counsel's April 14, 2008 letter requesting a change in treating physicians. Employer further contends that even assuming it refused or neglected claimant's request for treatment with OOA, employer nevertheless is not liable for medical benefits because claimant did not comply with the provisions of Section 7(d)(2) of the Act, 33 U.S.C. §907(d)(2).

The administrative law judge found that, by letter dated April 14, 2008, claimant's counsel provided notice to employer that he had no treating physician and sought treatment from Dr. Manale and that "employer ignored or took no action on Claimant's request for treatment."[12] Decision and Order at 21. The administrative law judge thus found that claimant sought authorization to treat with Dr. Manale, which employer refused. He therefore concluded that claimant is entitled to reimbursement for the treatment provided between 2008 and 2012 at OOA. *Id.*

Section 7(d) of the Act states that employer is not liable for medical benefits "unless employer shall have refused or neglected a request" for treatment. 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 the work 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) (5th Cir.), *cert. denied,* 479 U.S. 826 (1986). Once the 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.

The record contains correspondence between the parties and with the district director from 2007 through 2012 which sheds light on the issue of authorization for treatment at OOA. Specifically, this correspondence establishes: 1) claimant sought authorization to treat with Dr. Manale from employer's carrier; CX-E 4; 2) employer, at best, delayed approval pending further evidence regarding claimant's condition, including specifically whether his current condition is related to the work injury; EX 10

[12]The administrative law judge also stated that claimant's counsel's letter of October 13, 2008, to OWCP, indicated that claimant's prior treating physician, Dr. Olson, refused to treat claimant, thereby necessitating claimant's change to Dr. Manale.

at 6, 8; 3) at the district director's behest claimant contacted his previous treating physician, Dr. Olson, with the district director authorizing treatment only with Dr. Olson at that time; EX 10 at 9-10; 4) Dr. Olson, however, refused to treat claimant; EX 10 at 11; 5) thus, in October 2008, the district director approved a change in physicians as he did not believe, under those circumstances, that the carrier would object to Dr. Manale; EX 10 at 12; and 6) the district director subsequently stated, in March 2012, that carrier has "no objection to Dr. Manale as the authorized physician." EX 10 at 24; CX-E at 12.

Employer correctly asserts the administrative law judge erred in stating that "it did not respond" to claimant's April 2008 requests for authorization to treat with Dr. Manale. However, employer's carrier, by letter dated April 22, 2008, informed claimant that "causation will need to be determined" before authorization will be provided. EX 10 at 6. This letter is tantamount to a constructive refusal to authorize treatment. *See generally Parklands, Inc. v. Director, OWCP*, 877 F.2d 1030, 22 BRBS 57(CRT) (D.C. Cir. 1989). We affirm the administrative law judge's finding that claimant sought authorization for treatment at OOA in April 2008, which employer "ignored or took no action on," i.e., did not approve in a timely manner.[13] *Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996). We thus affirm the administrative judge's findings that in 2008 claimant sought and employer refused authorization for treatment of his work-related injuries by Drs. Manale and Adatto at OOA as it is supported by substantial evidence.[14]

Employer also raises Section 7(d)(2) as a defense to its liability for medical benefits.[15] Pursuant to Section 7(d)(2), an employer is not liable for medical expenses "unless, within 10 days following the first treatment, the physician giving such treatment furnishes to the employer and the [district director] a report of such injury or treatment,

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[13]Although the district director first referred claimant back to Dr. Olson only, Dr. Olson's refusal to treat claimant does not prevent the conclusion that employer is liable for the earlier treatment by OOA.

[14]Claimant sought treatment from Drs. Cellestine and Waring after OOA closed. The administrative law judge properly found that claimant did not need to seek approval for this treatment. *Lynch v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 29 (2005); *Maguire v. Todd Pacific Shipyards Corp.*, 25 BRBS 299 (1992).

[15]Employer, in asserting before the administrative law judge that claimant is not entitled to medical benefits, raised the issues that claimant did not comply with the provisions of 33 U.S.C. §907(b) and (d), and that "no medical reports from [OOA] were received concurrent with claimant's treatment at that clinic." Employer's Post-Hearing Brief at 25; Employer's Supp. Post-Hearing Brief at 17.

on a form prescribed by the Secretary." 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); 20 C.F.R. §702.422.[16] The authority to determine whether non-compliance with Section 7(d)(2) may be excused rests solely with the district director and not the administrative law judge. *See Krohn v. Ingalls Shipbuilding, Inc.*, 29 BRBS 72 (1995) (McGranery, J., dissenting); *Toyer v. Bethlehem Steel Corp.*, 28 BRBS 347 (1994) (McGranery, J., dissenting).

It cannot be discerned from the record whether claimant's doctors provided employer with the requisite reports in a timely fashion, or at all. We therefore vacate the administrative law judge's award of medical benefits. After the administrative law judge concludes the proceedings on remand, he should remand the case to the district director for consideration of employer's Section 7(d)(2) contention.[17] *Lopez v. Stevedoring Services of America*, 39 BRBS 85 (2005), *aff'd mem*., 377 F. App'x 640 (9th Cir. 2010); *Ferrari v. San Francisco Stevedoring Co.*, 34 BRBS 78 (2000). With respect to employer's contention that the administrative law judge erred by not considering the limitations on medical fees set forth by Section 7(g) of the Act, we refer employer to the regulations at 20 C.F.R. §§702.413 – 702.417.

[16]The implementing regulation at Section 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 . . . .

20 C.F.R. §702.422(b).

[17]We further note that to the extent employer objects to certain mileage claims, employer may, on remand, raise these issues with the district director, pursuant to 20 C.F.R. §702.407.

Accordingly, we affirm the administrative law judge's award of permanent total disability benefits. The administrative law judge's average weekly wage calculation is vacated and the case is remanded for further consideration of this issue. The administrative law judge's finding that employer refused to authorize treatment at OOA is affirmed, but the award of medical benefits is vacated. After resolving the average weekly wage issue, the administrative law judge should remand this case to the district director to address whether the requirements of Section 7(d)(2) were satisfied or excused, and to resolve employer's liability for medical benefits accordingly. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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GREG J. BUZZARD
Administrative Appeals Judge

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JONATHAN ROLFE
Administrative Appeals Judge