VANNEE (GRISTICK) WAGNER	)	BRB Nos. 96-1038
	)	and 96-1038A
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
DEPARTMENT OF THE ARMY/NAF	)	
	)	
Employer-Petitioner	)	
Cross-Respondent	)	
	)	
VANNEE (GRISTICK) WAGNER	)	BRB No. 96-1063
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DEPARTMENT OF THE ARMY/NAF	)	
	)	
Employer-Petitioner	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits in Part and Remanding to the District Director in Part, Supplemental Decision and Order (Upon Claimant's and Respondent's Requests for Reconsideration), and Supplemental Decision and Order Granting Attorney Fees of Robert D. Kaplan, Administrative Law Judge, and the 20 C.F.R. Section 702.422(b) Determination of John J. McTaggart, District Director, United States Department of Labor.

Kenneth A. Wise, Harrisburg, Pennsylvania, for claimant.

Lawrence P. Postol (Seyfarth, Shaw, Fairweather & Geraldson), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits in Part and Remanding to the District Director in Part, the Supplemental Decision and Order (Upon Claimant's and Respondent's Requests for Reconsideration), and the Supplemental Decision and Order Granting Attorney Fees (94-LHC-3249) of Administrative Law Judge Robert D. Kaplan, and the 20 C.F.R. Section 702.422(b) Determination (Case No. 03-25358) of District Director John J. McTaggart 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 Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *et seq.* (the Act). Additionally, claimant cross-appeals the administrative law judge's Supplemental Decision and Order Granting Attorney Fees. 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). The determinations of the district director may be set aside only if the challenging party shows them to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See, e.g., Sans v. Todd Shipyards Corp.*, 19 BRBS 24 (1986).

Claimant, involved in food preparation for employer, injured her left shoulder after lifting heavy pots and pans on January 13, 1993. Employer voluntarily paid claimant temporary total disability benefits from March 8, 1993 to January 23, 1994, and temporary partial disability benefits from January 23, 1994 to August 22, 1995. Employer also voluntarily paid claimant's medical expenses from March 8, 1993 to February 1, 1994. The administrative law judge ordered employer to pay claimant temporary total disability benefits from March 8, 1993 to March 1, 1995, and temporary partial disability benefits from March 1, 1995 through August 22, 1995. He denied continuing benefits. The administrative law judge further ordered that employer pay medical benefits pursuant to Section 7 of the Act, 33 U.S.C. §907, subject to the district director's findings under Section 7(d)(2) of the Act, 33 U.S.C. §907(d)(2), upon remand.

Claimant first sought treatment for her work-related left shoulder injury from employer's clinic two days after the injury. On February 2, 1993, the clinic referred her to an orthopedic surgeon, Dr. Zeliger. On November 17, 1994, Dr. Zeliger referred her to Dr. Morganstein, a physiatrist, as claimant was continuing to complain of discomfort in the neck and shoulders. Subsequently, on December 22, 1994, Dr. Morganstein referred claimant to Dr. Fink, a psychologist, to assist claimant with pain management. In this regard, the administrative law judge found that claimant was released from her obligation of requesting authorization for treatment by the specialists pursuant to Section 7(d)(1) of the Act, 33 U.S.C. §907(d)(1), as of December 21, 1993, when he found that employer first refused to pay for treatment by her treating physician, Dr. Zeliger. The administrative law judge remanded the case to the district director for a determination of whether the failure of Drs. Morganstein and Fink to comply with Section 7(d)(2) should be excused. Upon employer's motion for reconsideration, the administrative law judge reaffirmed his finding that claimant was relieved of the obligation to continue to seek approval for medical

treatment for her work-related injury after employer did not pay Dr. Zeliger's bill on December 21, 1993, but instead demanded an explanation of claimant's work history as a masseuse and its possible contribution to her shoulder injuries.

On remand, the district director excused claimant's medical providers from the failure to comply with the statutory reporting requirements under Section 7(d)(2) in the interest of justice, but declined to issue an award of Section 7 medical benefits until claimant addressed the reasonableness of certain medical charges under Section 7(g) of the Act, 33 U.S.C. §907(g).

Claimant's counsel subsequently submitted a fee petition to the administrative law judge requesting an attorney's fee of $19,733, representing 87.4 hours of attorney time at $125 per hour and 220.2 hours of paralegal time at $40 per hour, and expenses of $65.60 and litigation costs of $3,952.70. Claimant's counsel later reduced the number of attorney hours requested by 9.2 and the paralegal hours requested by 13.9. Claimant's counsel also requested interest of $4,691.11 on the attorney's fee and interest on costs incurred of $236.97. Employer filed objections to which claimant's counsel replied.

In his Supplemental Decision and Order Granting Attorney Fees, the administrative law judge ordered employer to pay claimant's counsel an attorney's fee of $13,933.50, representing 61.1 hours of attorney time at $125 per hour and 157.4 hours of paralegal time at $40 per hour, and litigation costs and expenses of $4,018.30. The administrative law judge denied claimant's request for interest as claimant's counsel's hourly rates were his current as opposed to his historic hourly rates and therefore reasonably compensated him for the delay in receiving his fee. The administrative law judge deducted 15.7 paralegal hours and 3.5 attorney hours for time spent preparing the fee petition and further reduced the fee requested by a total of 17 percent in accordance with the principles enunciated in *Hensley v. Eckerhart*, 461 U.S. 424 (1983).

Employer appeals the administrative law judge's award of medical benefits, BRB No. 96-1038, and the district director's determination under Section 7(d)(2), BRB No. 96-1063, contending it is not liable for care provided by the physical therapists, Dr. Morganstein and Dr. Fink. Employer further appeals, and claimant cross-appeals, the administrative law judge's award of an attorney's fee, BRB Nos. 96-1038S and 96-1038A.

Section 7(d)(1)

Employer initially contends that the administrative law judge erred in relying on Ms. Dukes' letter dated February 17, 1994, to Dr. Zeliger to support his finding that employer refused to provide medical care such that claimant did not need to request authorization for subsequent medical treatment. Employer also asserts that claimant was not excused from requesting authorization from employer before going to subsequent specialists even though claimant's treating physician referred her to the initial specialist, who in turn referred her to an additional specialist.

Section 7(d)(1) provides:

> An employee shall not be entitled to recover any amount 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; or
>
> (B) the nature of the injury required such treatment and services and the employer or his superintendent or foreman having knowledge of such injury shall have neglected to provide or authorize same.

33 U.S.C. §907(d)(1).[1] Section 7(d)(1) has been interpreted as requiring that claimant request employer's authorization for medical services performed by *any* physician, including claimant's initial choice. *See Maguire v. Todd Shipyards Corp.*, 25 BRBS 299, 301 (1992); *see also Slattery Associates, Inc. v. Lloyd*, 725 F.2d 780, 16 BRBS 44 (CRT)(D.C. Cir. 1984), *rev'g* 15 BRBS 100 (1980); *Maryland Shipbuilding & Dry Dock Co. v. Jenkins*, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979); *Nardella v. Campbell Machine, Inc.*, 525 F.2d 46, 3 BRBS 78 (9th Cir. 1975); *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). Where claimant's request for authorization is refused by employer, claimant is released from the obligation of continuing to seek approval for any 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, e.g., Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989).

[1]The implementing regulation found at 20 C.F.R. §702.421 contains similar provisions.

Employer's challenge to the administrative law judge's finding that Ms. Dukes' letter to Dr. Zeliger dated February 17, 1994 constitutes a refusal on the part of employer to pay the medical bills has merit. In his initial decision in this case, the administrative law judge found that claimant was released from her obligation of requesting authorization prior to treatment by Drs. Morganstein and Fink, a physiatrist and psychologist, respectively, as employer refused to pay for treatment by Dr. Zeliger as of December 21, 1993, citing to Claimant's Exhibits 13b and 25.[2] Decision and Order at 22. In her letter to Dr. Zeliger, Ms. Dukes asked the physician whether claimant's part-time job as a masseuse caused or contributed to her work-related left shoulder injury and requested a response as soon as possible so that the claim could be resolved. The letter states in relevant part,

> As you know, as of January 21, 1994, we stopped workers' compensation benefits on . . . Vannee Gristick. Our investigation of this claim has now revealed that the claimant was employed as a masseuse for at least the past 6 years.
>
> . . . .
>
> Dr. Zeliger, in your medical opinion, could the repetitive use of her arms as a masseuse have caused or contributed in any way to her injury of the left and right shoulders? It is imperative that we receive your response to these questions as soon as possible so that we may resolve this claim.

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[2]Claimant's Exhibit 13b is a statement of claimant's outstanding medical expenses from December 21, 1993 through March 16, 1995 reflecting bills from Dr. Zeliger, claimant's treating physician, as well as for physical therapy with Central Pennsylvania Fitness Center, the Harrisburg YMCA, Healthsouth Rehabilitation of Mechanicsburg, and East Shore Orthopedic Associates, and Drs. Morganstein and Fink. It shows that employer paid on June 2, 1994, claimant's medical bills for Dr. Zeliger for visits from December 21, 1993 to February 1, 1994. However, it does not indicate payment for Dr. Zeliger's bills from February 2, 1994 to December 8, 1994 or for Dr. Morganstein's bills from January 1995 to March 1995, Dr. Fink's bills from January 10, 1995 to March 8, 1995, and physical therapy bills from February 2, 1994 to March 16, 1995. Claimant's Exhibit 25 is Ms. Dukes' letter to Dr. Zeliger dated February 17, 1994.

CX 25. Dr. Zeliger responded that claimant's work as a masseuse could have played a causative role in her left shoulder injury. EX 30.

On reconsideration, the administrative law judge affirmed his finding that Ms. Dukes' letter to Dr. Zeliger relieved claimant of her obligation to seek authorization for subsequent medical treatment for her work-related injury. The administrative law judge noted that employer responded, not by paying the outstanding bills, but with a letter requesting an explanation of claimant's work history as a masseuse and its possible contribution to her shoulder injuries. Supplemental Decision and Order on Reconsideration at 2; CX 25.

As Ms. Dukes' letter to Dr. Zeliger was an inquiry about the work-relatedness of claimant's condition and not a refusal to pay the medical expenses, the administrative law judge's decision is not supported by substantial evidence. We therefore reverse the administrative law judge's holding that this letter constituted a refusal to pay claimant's medical bills such that claimant was relieved of her obligation of requesting authorization for subsequent treatment. *See generally Parklands, Inc. v. Director, OWCP*, 877 F.2d 1030, 22 BRBS 57 (CRT)(D.C. Cir. 1989)*(*employer's reply simply requesting more details about the claim did not purport to authorize treatment*);* 33 U.S.C. §907(d)(1); 20 C.F.R. §702.421. Moreover, employer did pay Dr. Zeliger's bills up to February 2, 1994. We, therefore, remand this case to the administrative law judge to determine whether employer, in fact, refused to authorize treatment at some other time.[3] Employer's second notice of controversion dated April 28, 1994, EX 11, which stated that claimant's temporary total disability benefits and medical treatment remain denied, based on Dr. Zeliger's report that claimant's second job as a masseuse could have contributed to her shoulder problem, could constitute a refusal of further medical treatment. Further, the bills of both Drs. Fink and Healthsouth Rehabilitation of Mechanicsburg (physical therapy) were returned by employer to those medical providers with a copy of this controversion. *See* CX 26, 27. If the administrative law judge finds that employer refused further treatment, claimant is released from her obligation of continuing to seek approval for her subsequent treatment. *Anderson*, 22 BRBS at 20. If, however, the administrative law judge finds that employer's actions did not constitute a refusal of authorization, the administrative law judge must address employer's argument regarding whether claimant sought authorization for the specialists to whom Dr. Zeliger referred her.[4] *See Maguire*, 25 BRBS at 299.

[3]The record contains a written authorization by employer for claimant's choice of a physician on September 27, 1993, *see* EX 7, but no specific physician is filled in at the appropriate blank. During this time, claimant was treated by Dr. Zeliger, and employer does not contend this treatment was unauthorized.

[4]In this regard, employer asserts that no provision in the Act excuses a claimant from requesting authorization for subsequent specialists. Employer relies on 20 C.F.R. §702.406, which provides that an employee must obtain consent from the employer or the district director to change physicians, but that such consent shall be given where an employee's initial choice was not that of a specialist whose services are necessary for the treatment of the work-related injury. Based on this provision, the Board has affirmed an

administrative law judge's finding that claimant was not required to seek prior authorization for treatment by a psychiatrist to whom she was referred by her treating neurosurgeon. The Board reasoned that the neurosurgeon, by referring claimant, thus provided the care of the appropriate specialist. *Armfield v. Shell Offshore, Inc.*, 25 BRBS 303 (1992) (Smith, J., dissenting on other grounds). Other cases, however, have upheld the principle that claimant must request authorization even in situations where employer must consent, such as when claimant makes her initial free choice. *See* cases cited *infra* at 4. *Armfield* does not discuss or attempt to reconcile these holdings, focusing on employer's specific argument that the administrative law judge erred in finding that claimant was in fact referred by her treating physician to the psychiatrist. Inasmuch as this issue has not been addressed by the administrative law judge or fully briefed by the parties, and as the issue of employer's refusal to provide treatment may well be dispositive, we will leave this issue for further development by the administrative law judge on remand should he reach it. To the extent employer alleges that claimant failed to seek authorization for physical therapy, we note that such therapy may be viewed by the administrative law judge as treatment prescribed by a physician as opposed to treatment rendered by a different physician. Thus the administrative law judge should determine whether claimant was required to seek authorization for the physical therapists to whom Dr. Zeliger, her treating physician, referred her.

Section 7(d)(2)

Employer next contends that the district director erred in finding that it was in the interest of justice to excuse the failure of the attending physicians, the physical therapists, and Drs. Morganstein and Fink, to file the required reports based on the fact that employer controverted the claim and could show no prejudice. Employer asserts that these factors do not excuse claimant's physicians from filing the required reports.[5]

Section 7(d)(2) provides:

> No claim for medical or surgical treatment shall be valid and enforceable against such employer unless, within ten days following the first treatment, the physician giving such treatment furnishes to the employer and the deputy commissioner a report of such injury or treatment, on a form prescribed by the Secretary. The Secretary may excuse the failure to furnish such a report within the ten-day period whenever he finds it to be in the interest of justice to do so.

[5]Employer does not assert that Dr. Zeliger, claimant's initial choice of physician, did not file the required report. In fact, Dr. Zeliger filed an attending physician's report on March 11, 1993. EX 30 at g.

33 U.S.C. §907(d)(2)(1988);[6] *see 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. Kaiser Aluminum & Chemical Corp.*, 23 BRBS 1 (1989), *aff'd in pertinent part*, 938 F.2d 981, 25 BRBS 13 (CRT)(9th Cir. 1991); 20 C.F.R. §702.422(b). The Board has held that the authority to determine whether non-compliance with Section 7(d)(2) may be excused rests with the district director and not the administrative law judge. *Krohn v. Ingalls Shipbuilding, Inc.*, 29 BRBS 72 (1995)(McGranery, J., dissenting); *Toyer v. Bethlehem Steel Corp.*, 28 BRBS 347 (1994)(McGranery, J., dissenting). A decision of the district director will not be set aside unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion or not in accordance with law. *Plappert v. Marine Corps Exchange,* BRBS , BRB Nos. 96-776 and 96-1031 (Mar. 18, 1997). Even if employer explicitly refuses treatment, claimant is still obligated to file the reports. *Mattox v. Sun Shipbuilding & Dry Dock Co.*, 15 BRBS 162, 172 (1983).

Employer's argument regarding the district director's determination under Section 7(d)(2) has merit, which requires us to remand this case to the district director for further consideration. In his determination, the district director excused the medical providers from compliance with the statutory reporting requirements as the services provided by them occurred after employer filed its notice of controversion on April 28, 1994, and no prejudice to employer was demonstrated.[7] District Director's Determination at 2. The district director found that employer's failure to aggressively monitor Dr. Zeliger's treatment caused it to be unaware of the referrals to Drs. Morganstein and Fink.

We hold that the district director abused his discretion in determining that the failure of claimant's physicians to properly file the required reports was excused in the interest of justice based on the fact that employer filed a notice of controversion. Employer's filing of a notice of controversion does not excuse the failure of claimant's physicians to properly file the required reports. *See Force*, 23 BRBS at 1*; Mattox*, 15 BRBS at 162. As the basis for the district director's finding is insufficient, the case must be remanded for reconsideration of whether good cause for excusing the failure to report has been shown. In this regard, employer's argument that it was prejudiced by the failure of Drs. Morganstein and Fink to

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[6]The implementing regulation, 20 C.F.R. §702.422(b), states:

> *For good cause shown*, the Director may excuse the failure to comply with the reporting requirements of the Act and further, may make an award for the reasonable value of such medical care.

20 C.F.R. §702.422(b)(emphasis added).

[7]In her affidavit of May 17, 1995, Ms. Dukes states that the medical providers, Drs. Morganstein and Fink and the physical therapists (Healthsouth Rehabilitation of Mechanicsburg, Central Pennsylvania Fitness Center, Inc., and Harrisburg YMCA), never filed attending physicians' reports. EX 64.

file their reports must be addressed. As it appears that employer did not get a copy of the records of either Drs. Morganstein or Fink until February 3, 1995 through a subpoena and did not know about the referrals until after January 5, 1995, when it received claimant's supplemental answers to interrogatories, the district director must consider whether employer was prejudiced in that it could not monitor claimant's medical care when it was unaware of it. *See Roger's Terminal*, 784 F.2d at 687, 18 BRBS at 79 (CRT). Consequently, we vacate the district director's determination under Section 7(d)(2) and remand this case to the district director to reconsider whether it is in the interest of justice to excuse the providers from the failure to comply with the statutory reporting requirements. See *Toyer*, 28 BRBS at 347; *Maguire*, 25 BRBS at 299.

Attorney's Fee

Employer further contends that the administrative law judge erred in awarding an excessive attorney's fee and costs and in ignoring employer's objections to claimant's counsel's fee request. Claimant cross-appeals the attorney's fee award, contending that the administrative law judge erred in failing to award him interest on the attorney's fees and costs, in failing to compensate him for the time spent in preparing the fee petition, and in making deduction for issues upon which the administrative law judge found claimant did not prevail.[8] The amount of an attorney's fee award is discretionary and may be set aside only if the challenging party shows it to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.,* 12 BRBS 272 (1980).

Subsequent to the administrative law judge's award of an attorney's fee in this case, the United States Court of Appeals for the Ninth Circuit held in *Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67 (CRT)(9th Cir. 1996), that time spent preparing a fee petition is compensable. In light of the court's holding, we vacate the administrative law judge's disallowance of claimant's counsel's time spent in preparing the fee petition and remand this case to the administrative law judge to award a reasonable amount of time to claimant's counsel for preparing the fee petition. *Id.* Additionally, in light of our remand of this case on the medical benefits issue, the administrative law judge may reconsider the amount of the fee in light of his decision on remand.

Contrary to employer's contention, the administrative law judge acted within his discretion in denying employer's request for a hearing on the fee petitition as due process requirements were satisfied in this case as employer was given notice of the attorney's fee petition when it received it and was given the opportunity to be heard by filing written objections. *See Todd Shipyards Corp. v. Director, OWCP [Hilton]*, 545 F.2d 1176, 5 BRBS 23 (9th Cir. 1976), *rev'g Hilton v. Todd Shipyards Corp.*, 1 BRBS 159 (1974). *See also*

[8]On appeal, claimant's counsel submitted to the Board a motion to update his fee petition filed before the administrative law judge to reflect his new hourly rates of $135 for attorneys and $50 for paralegals. Employer opposes this motion. We deny claimant's motion to update his fee petition as the Board cannot award a fee for work performed before the administrative law judge. 33 U.S.C. §928(c). Claimant's counsel should file his motion with the administrative law judge, who has discretion to augment the fee on remand. *Nelson v. Stevedoring Services of America*, 29 BRBS 90 (1995).

Hensley, 461 U.S. at 424 (a request for an attorney's fee should not result in a second major litigation).

We reject employer's contention that the administrative law judge improperly assessed an attorney's fee against employer in this case under Section 28(b) of the Act, 33 U.S.C. 928(b). Despite the fact that employer followed the district director's recommendation, where, as here, claimant obtains additional compensation before the administrative law judge, employer is liable for a fee under Section 28(b). *See Todd Shipyards Corp. v. Director, OWCP [Watts]*, 950 F.2d 607, 25 BRBS 65 (CRT)(9th Cir. 1991); *Mason v. Baltimore Stevedoring Co.*, 22 BRBS 413 (1989). Moreover, we reject both parties' remaining challenges to the amount of the fee awarded. The administrative law judge acted within his discretion in computing the fee based on the hourly rates of $125 and $40 for claimant's counsel and paralegal, respectively, to compensate for delay in payment after finding that these rates were the current rates based on the information contained in the fee petition. *See Anderson,* 91 F.3d at 1322, 30 BRBS at 67 (CRT); *Nelson v. Stevedoring Services of America*, 29 BRBS 90 (1995); *but see* n.8, *supra*. The administrative law judge rationally found that claimant's counsel was entitled to the requested costs and expenses documented in the fee petition as they were not incurred solely in support of issues on which claimant was entirely unsuccessful and that the remainder of the fee petition reflected proper billing judgment and is sufficiently documented. Moreover, the administrative law judge considered the amount of benefits and claimant's lack of success on the average weekly wage issue and on the claim for continuing temporary total disability benefits and did not abuse his discretion in reducing the fee by 17 percent. *See Hensley*, 461 U.S. at 424; *George Hyman Construction Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161 (CRT)(D.C.Cir. 1992).

Accordingly, the administrative law judge's finding that Ms. Dukes' letter dated February 17, 1994, constitutes a refusal on the part of employer to pay medical bills is vacated, and the case is remanded to the administrative law judge for further consideration of the evidence on this issue consistent with this opinion. The district director's determination that it was in the interest of justice to excuse the failure of the attending physicians to file the required reports is also vacated, and the case is remanded to the district director for further consideration consistent with this opinion. On remand, the administrative law judge must award claimant's counsel a reasonable fee for time spent in preparing the fee petition, and he may reconsider the fee award in light of his decision on remand as appropriate. In all other respects, the administrative law judge's awards of benefits and an attorney's fee are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge