BRB No. 91-530

WHEELER F. JONES	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HOLT CARGO SYSTEMS, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
NATIONAL UNION FIRE INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of E. Earl Thomas, Administrative Law Judge, United States Department of Labor.

Simon W. Tache, Philadelphia, Pennsylvania, for claimant.

Clayton H. Thomas, Philadelphia, Pennsylvania, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (90-LHC-502) of Administrative Law Judge E. Earl Thomas denying 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).

*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).

Claimant was operating a chisel or fork lift truck when he was injured on February 27, 1989. Claimant jumped from the chisel and slipped, falling and injuring his low back and left hip. The injury was first reported to employer on March 17, 1989. Employer filed a First Report of Injury on March 20, 1989 and a Notice of Controversion on March 24, 1989. *See* Emp. Exs. A, B. Employer initiated payment of compensation for temporary total disability and provided medical care. Compensation was terminated on May 17, 1989, based on a medical report stating that claimant had recovered from his work-related injury and was able to return to work. Employer filed a second Notice of Controversion on May 26, 1989. *See* Emp. Ex. F. Claimant returned to work as a longshoreman on May 25, 1989 and worked until May 31, 1989, which is the last date he worked. Claimant sought temporary total disability benefits from May 31, 1989 and continuing.

At an informal conference on August 29, 1989, claimant agreed to undergo an additional medical evaluation and employer voluntarily agreed to pay additional temporary total disability compensation from August 29, 1989 without prejudice pending results of the additional medical examinations. Claimant, however, failed to keep an appointment which was scheduled by employer with its orthopedic consultant, Dr. Gross, on September 27, 1989. Employer terminated compensation and filed a Notice of Controversion on October 16, 1989, controverting the right to additional compensation based on claimant's failure to keep the scheduled medical appointment. *See* Emp. Ex. J.

In his Decision and Order, the administrative law judge found that the evidence substantiates Dr. Gross' opinion that claimant was totally recovered from his injury by May 19, 1989, and, thus, that employer's obligation to continue disability payments and medical treatment ended upon claimant's release to work by his treating physician, Dr. Lefkoe, on May 23, 1989. Decision and Order at 9. The administrative law judge also found that although employer is not liable for the payment of compensation past Dr. Lefkoe's release on May 23, 1989, the termination of benefits for claimant's failure to keep the scheduled appointment pursuant to Section 7(d)(4), 33 U.S.C. §907(d)(4)(1988), was fully justified. Decision and Order at 10. Furthermore, as the treatment provided by Dr. Ruth was unauthorized, the administrative law judge found that employer is not responsible for the medical bills of Dr. Ruth or the consulting neurologist, Dr. Mandel. Decision and Order at 12. Finally, the administrative law judge found that employer had no reason to know of a potential controversy until claimant filed his notice of injury, and that as employer filed a notice of controversion within 14 days, Section 14(e), 33 U.S.C. §914(e), does not apply. Decision and Order at 13.

On appeal, claimant contends that the administrative law judge erred in finding that the evidence establishes that claimant had totally recovered from his work-related injury by May 23, 1989, and in finding that employer was justified in terminating compensation on September 27, 1989 based on claimant's failure to attend a medical evaluation by Dr. Gross. In addition, claimant contends that the administrative law judge erred in failing to address whether the treatment procured from Dr. Ruth was authorized and in finding that employer was not liable for the medical bills of Dr. Ruth and the consulting physician, Dr. Mandel. Finally, claimant contends that the administrative law judge erred in failing to assess a 10 percent penalty against employer for failure to timely

controvert the claim or begin payments pursuant to Section 14(e), 33 U.S.C. §914(e). Employer responds, urging affirmance of the administrative law judge's Decision and Order as it is supported by substantial evidence.

Initially, we reject claimant's contention on appeal that the administrative law judge erred in finding that claimant is not temporarily totally disabled. To establish a *prima facie* case of total disability, claimant must show that he cannot return to his regular or usual employment due to his work-related injury. *Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989). In the present case, following an examination and a negative CT scan, Dr. Lefkoe, claimant's treating physician reported that there is nothing to preclude claimant from returning to work as of May 23, 1989.[1] Cl. Ex. 19. Dr. Gross, employer's consulting physician, reported on May 18, 1989 that there were no objective findings that would prevent claimant from returning to his employment. Emp. Ex. P. He also reported on May 7, 1990 that his opinion had not changed and that the medical records and previous examinations indicate a low back strain which resolved objectively by May 18, 1989. Emp. Ex. W. A report by Dr. Mittledorf interpreted an EMG taken on March 20, 1989 as completely negative for any involvement of the lower extremities or back. Emp. Ex. M. Only Dr. Ruth stated that claimant continued to suffer a disability of his lower back.[2] Dr. Ruth diagnosed that claimant suffered a herniated disc with bilateral lumbar sciatica as a result of his injury on February 27, 1989. Dr. Ruth concluded that claimant could not return to work as a longshoreman.

The administrative law judge concluded that the negative results of the EMG combined with the lack of any positive neurological findings by Drs. Williams, Lefkoe and Gross strengthen the conclusion that claimant's injury was of a soft tissue nature and did not result in any permanent damage to the nerves or discs of the lumbar spine. Thus, the administrative law judge rejected Dr. Ruth's opinion that claimant suffered from a herniated disc as it is not supported by the objective evidence of record. In addition to the medical evidence, the administrative law judge noted that claimant continued working the day of the fall[3] and did not seek medical treatment or report the injury for 14 days. He also noted that employer submitted numerous videotapes showing claimant's ability to stand, sit, bend, and lift. Emp. Exs. T, U, V.

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[1]Dr. Lefkoe did note that a supervised physical therapy conditioning program would be beneficial for claimant even after he is working, but did not preclude his return to full duties as of May 23, 1989. In a report dated September 8, 1989, Dr. Lefkoe reported that no neurologic deficit was elicited but that he recommended that claimant avoid repetitive lifting, twisting and bending. The administrative law judge rejected this report as he found that Dr. Lefkoe's opinion was based on claimant's subjective complaints alone and not on the objective evidence. Moreover, Dr. Lefkoe stated in this report claimant could work as a fork lift operator, which is claimant's usual work.

[2]Dr. Mandel, Dr. Ruth's consulting neurologist, reported evidence of a herniated disc at the L5-S1 level and a bulging disc at the L4-5 region. His diagnosis was lumbar radiculopathy, but he did not offer an opinion with regard to the extent of claimant's disability.

[3]Claimant testified that, although he did not continue working, he did remain in the hold of the ship and on the time clock until 9:00 p.m. H. Tr. at 42

Contrary to claimant's assertions, the administrative law judge's finding that claimant could return to his usual work in May 1989 is supported by the objective evidence of record and by the opinions of Drs. Lefkoe and Gross. Claimant has raised no reversible error committed by the administrative law judge in weighing the conflicting evidence and making credibility determinations. *See generally Uglesich v. Stevedoring Services of America*, 24 BRBS 180 (1991). Therefore, we affirm the administrative law judge's finding that the evidence establishes that claimant was totally recovered from his injury by May 23, 1989, and thus is not entitled to further compensation benefits.[4] *Chong v. Todd Pacific Shipyards Corp*., 22 BRBS 242 (1989), *aff'd mem. sub nom. Chong v. Director, OWCP*, 909 F.2d 1488 (9th Cir. 1990).

Claimant also contends that the administrative law judge did not address whether Dr. Ruth was authorized to treat him. Claimant contends that the administrative law judge erred in finding that employer is not liable for the fees of Drs. Ruth and Mandel. On the contrary, the administrative law judge found that claimant testified that Dr. Lefkoe was his initial "free-choice" physician and that he was not sent to Dr. Lefkoe by employer. Further, the administrative law judge found that claimant testified that he did not request consent from either employer or the district director[5] to change physicians to Dr. Ruth as required by the Act and regulations and that consent was never given. *See* 33 U.S.C. §907(c)(2)(1988); 20 C.F.R. §702.421; H. Tr. at 64; Decision and Order at 11. Thus, the administrative law judge concluded employer is not responsible for the unauthorized treatment of Dr. Ruth or the consulting neurologist, Dr. Mandel. Decision and Order at 12.

[4]As we affirm the administrative law judge's finding that claimant is not entitled to benefits after May 23, 1989, we need not address claimant's arguments with regard to whether the administrative law judge rationally found that employer's termination of benefits on September 27, 1989 was justified pursuant to Section 7(d)(4), 33 U.S.C. §907(d)(4)(1988).

[5]Pursuant to Section 702.105 of the regulations, 20 C.F.R. §702.105, the term "district director" has replaced the term "deputy commissioner" used in the statute.

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).

In the present case, claimant testified that he tried to call Dr. Lefkoe once during the first week he was off work and that he did not receive a return call. One week later, he made an appointment with Dr. Ruth. It is undisputed that claimant did not make an attempt to receive authorization to change to Dr. Ruth. H. Tr. at 64. Further, the administrative law judge found that the evidence does not establish that claimant was refused medical treatment by Dr. Lefkoe.[6] The administrative law judge noted that Dr. Lefkoe told claimant to call him if he had any further trouble after his release for full duties on May 19, 1989. *See* Cl. Ex. 19. Inasmuch as the administrative law judge rationally found that claimant did not seek prior authorization to treat with Drs. Ruth and Mandel, we affirm the administrative law judge's finding that employer is not liable for the unauthorized treatment provided by Drs. Ruth and Mandel. *See generally Lustig v. Todd Shipyards Corp.*, 20 BRBS 207 (1988), *aff'd in part and rev'd in part on other grounds sub nom. Lustig v. U.S. Dept. of Labor*, 881 F.2d 593, 22 BRBS 159 (CRT)(9th Cir. 1989).

Finally, claimant contends that the administrative law judge erred in failing to assess a 10 percent penalty against employer for failure to timely controvert the claim or begin payments pursuant to Section 14(e), 33 U.S.C. §914(e). We disagree. Section 14(e) of the Act, 33 U.S.C. §914(e), provides in pertinent part 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. Section 14(b), 33 U.S.C. §914(b), provides that an installment of compensation is "due" on the 14th day after the employer has been notified of an injury pursuant to Section 12 of the Act, 33 U.S.C. §912, or the employer has knowledge of the injury. An employer is imputed to have knowledge if it knows of the injury and of such facts that a reasonable man would consider that compensation liability was possible and that further investigation should be made. *Pardee v. Army & Air Force Exchange*, 13 BRBS 1130 (1981); *Willis v. Washington Metropolitan Area Transit Authority*, 12 BRBS 18 (1980).

[6]Although Dr. Gross' release to work could be construed as employer's refusal to treat, *see Luna Rivera v. National Metal & Steel Corp.*, 16 BRBS 135 (1984), Dr. Lefkoe, claimant's treating physician, did not refuse to treat him as necessary. *See* Cl. Ex. 19; Decision and Order at 12. Furthermore, employer did not refuse to pay for Dr. Lefkoe's treatment as claimant's authorized doctor. *See* 33 U.S.C. §907(c)(2).

In the instant case, the administrative law judge found that the employer did not have knowledge of the injury and was not aware of a potential controversy until claimant reported the injury on March 17, 1989. Although employer's representatives saw claimant fall on February 27, 1989, claimant appeared to continue working that day and reported to work the next several days.[7] In addition, the administrative law judge found that claimant did not challenge one of the gang boss's statements "you were lucky - you could have been hurt." H. Tr. at 18, 46; Decision and Order at 13. Thus, the administrative law judge concluded that employer had no reason to suspect that claimant was injured until he filed his notice of injury.

It is the duty of the trier-of-fact to determine when employer had knowledge of claimant's injury. *Davenport v. Apex Decorating Co., Inc.*, 13 BRBS 1029 (1981). Therefore, we affirm the administrative law judge's finding in the present case that employer did not have knowledge that claimant had been injured until claimant reported the injury on March 17, 1989 as it is rational and supported by substantial evidence. Consequently, we also affirm the administrative law judge's denial of a 10 percent penalty pursuant to Section 14(e) as employer timely filed a notice of controversion on March 24, 1989.

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

LEONARD N. LAWRENCE
Administrative Law Judge

[7]Claimant did not work on these days, however, as there was no work available.