BRB No. 92-0887

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| FLORENTINO RODRIGUEZ | ) | |
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| Claimant-Petitioner | ) | |
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| v. | ) | |
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| SEA-LAND SERVICE, INCORPORATED | ) | DATE ISSUED: |
| | ) | |
| and | ) | |
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| CRAWFORD & COMPANY | ) | |
| | ) | |
| Employer/Carrier-Respondents | ) | DECISION and ORDER |

Appeal of the Decision and Order Denying the Payment of Medical Benefits of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

Philip J. Rooney (Israel, Adler, Ronca & Gucciardo), New York, New York, for claimant.

Keith L. Flicker and Richard L. Garelick (Flicker, Garelick & Associates), for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying the Payment of Medical Benefits (91-LHC-0602) of Administrative Law Judge Ainsworth H. Brown 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 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).

Claimant injured his back while working for employer on August 27, 1989. He was initially treated by Dowd Industrial Medical Center, a clinic with whom employer is associated. On August 30, 1989, Dowd referred claimant to the Elizabeth Orthopedic Group, a medical group consisting of three orthopedists, Drs. Holtzman, Carollo and Schoifet. Claimant was subsequently diagnosed as

suffering from acute lumbar radiculopathy and recurrent left femoral hernia.[1] On September 5, 1989, claimant commenced physical therapy for his low back with B.E.S.T. Institute, the Elizabeth Group's physical therapists. In October 1989, claimant, pursuant to the Elizabeth Group's recommendation, underwent an MRI. Thereafter, in November 1989, claimant was advised by the physicians at the Elizabeth Group of the need for surgery, specifically, a decompressive laminectomy. Claimant, however, declined to undergo this recommended surgical procedure.

On December 1, 1989, claimant requested employer's authorization to be treated by Dr. Fateh. Employer, although declining to authorize claimant's treatment with Dr. Fateh, did not object to claimant's obtaining a second opinion from that physician. Claimant continued to receive treatment from the Elizabeth Group until January 1990; moreover, he continued treatment with the B.E.S.T. Institute through February 2, 1990. Later in February, claimant was examined by Dr. Fateh; in a March 27, 1990 report, Dr. Fateh concurred with the opinion of the Elizabeth Group physicians that claimant's back condition requires that he undergo a decompressive laminectomy. Claimant continued treatment with Dr. Fateh and his physical therapy group through July 1990; his unpaid medical bills for these treatments total $4,510. Claimant filed a claim under the Act seeking reimbursement for the medical expenses which he incurred as a result of his treatment with Dr. Fateh.

In his Decision and Order, the administrative law judge first found that the Elizabeth Group's physicians were claimant's physicians of free choice. He then found that, pursuant to Section 7(c)(2) of the Act, 33 U.S.C. §907(c)(2)(1988), and Section 702.406(a) of the Act's implementing regulations, 20 C.F.R. §702.406(a), claimant failed to establish good cause for a change in physicians. Thus, the administrative law judge determined that employer is not liable for medical benefits for treatment by Dr. Fateh, other than the initial second opinion consultation fee of that physician.

On appeal, claimant contends that the administrative law judge erred in applying Section 7(c)(2), since the Elizabeth Group physicians were not his initial physicians of choice; rather, claimant asserts, he was sent to those physicians by employer. Claimant further argues that his acquiescence to treatment by the Elizabeth Group physicians does not deprive him of his right to choose his own physician pursuant to Section 7(b) of the Act, 33 U.S.C. §907(b). Employer responds, urging affirmance of the administrative law judge's decision.

[1]Claimant underwent surgery for his hernia condition. The medical payments for this procedure are not at issue in this case.

Section 7(b) of the Act provides that "[c]hange of physicians at the request of employees shall be permitted in accordance with regulations of the Secretary." 33 U.S.C. §907(b). Section 702.406(a) of the regulations provides:

> Whenever the employee has made his initial, free choice of an attending physician, he may not thereafter change physicians without the prior written consent of the employer (or carrier) or the district director. Such consent shall be given in cases where an employee's initial choice was not of a specialist whose services are necessary for, and appropriate to, the proper care and treatment of the compensable injury or disease. In all other cases, consent may be given upon a showing of good cause for change.

20 C.F.R. §702.406(a); *see also* 33 U.S.C. §907(c)(2)(1988). In the instant case, claimant, who was referred to the Elizabeth Group on August 30, 1989, continued treatment with the Elizabeth Group orthopedists until January 1990, and the B.E.S.T. Institute for physical therapy until February 2, 1990. Regarding this treatment, claimant testified that he went approximately three times a week for therapy at the B.E.S.T. Institute, that he felt good while he was under this treatment, and that he was additionally satisfied with the treatment which he was receiving from the Elizabeth Group. Tr. at 35. Moreover, claimant testified that he knew that he was entitled to select his own physician. Tr. at 23. Inasmuch as claimant continued to seek and receive medical care by both the Elizabeth Group and the B.E.S.T. Institute for over four months subsequent to his injury, we affirm the administrative law judge's rational finding that the Elizabeth Group orthopedists were claimant's initial physicians of choice. *See, e.g., Hunt v. Newport News Shipbuilding & Dry Dock Co.*, 28 BRBS 364 (1994); *Senegal v. Strachan Shipping Co.*, 21 BRBS 8 (1988).

Claimant also asserts that he was effectively refused medical treatment by employer and that, thus, his failure to obtain employer's authorization for treatment with Dr. Fateh may be excused. We disagree. In the instant case, it is undisputed that claimant sought and was refused authorization by employer to treat with Dr. Fateh; additionally, it is uncontroverted that the Elizabeth Group physicians specialize in the area of orthopedics. *See* 20 C.F.R. §702.406(a). Thus, the sole remaining issue is whether claimant established good cause for a change of physicians. In this regard, the administrative law judge placed great weight on claimant's unequivocal testimony at the formal hearing that he was never told by the Elizabeth Group that his therapy would terminate if he did not agree to undergo surgery, and that claimant continued therapy with the B.E.S.T. Institute following his decision to leave the Elizabeth Group. Based upon these findings, the administrative law judge specifically noted that it was claimant, and not employer, who discontinued therapy with those physicians.[2] Moreover, the administrative law judge found that Dr. Fateh reached the same medical conclusion as the Elizabeth Group physicians - that claimant's condition requires surgery.

[2]Although Dr. Holtzman, in a letter to employer's claims examiner dated January 3, 1990, stated that claimant would probably be terminated from active care as having reached maximum medical improvement unless he agreed to the recommended surgery, claimant testified that Dr. Holtzman never told him he would be terminated from care. Tr. at 39, 43-44. Thereafter, in January 1990, claimant was supplied with a TENS unit by the Elizabeth Group for home care. Emp. Ex. M.

As the administrative law judge's findings that claimant received medical treatment from his initial choice of physicians, that employer did not refuse further treatment from that choice, and that claimant failed to establish good cause for a change of physicians are rational and supported by substantial evidence, employer is not required to consent to a change of physicians. 33 U.S.C. §907(c)(2); 20 C.F.R. §702.406(a). We therefore affirm the administrative law judge's determination that employer is not responsible for the medical charges incurred as a result of claimant's treatment with Dr. Fateh. *See Hunt*, 28 BRBS at 371; *Senegal*, 21 BRBS at 11.

Accordingly, the Decision and Order Denying the Payment of Medical Benefits of the administrative law judge is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge