BRB No. 94-2639

JOSEPH MALONE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
INTERNATIONAL TERMINAL OPERATING COMPANY, INCORPORATED	)	DATE ISSUED:
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Joel R. Williams, Administrative Law Judge, United States Department of Labor.

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

Christopher J. Field (Gallagher & Field), New York, New York, for self-insured employer.

Before: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (93-LHC-1374) of Administrative Law Judge Joel R. Williams 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, leg, wrists, and neck in a fall sustained on May 8, 1992, while in the course of his employment as a stevedore with employer. Employer voluntarily paid claimant benefits for temporary total disability from May 9, 1992 to January 20, 1993, pursuant to 33 U.S.C. §908(b). Additionally, employer authorized surgery involving a laminectomy of claimant's herniated disc at L4-5 on November 20, 1992. Claimant, however, declined to undergo this surgical procedure. Thereafter, on January 6, 1993, employer requested that the district director[1] issue a

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

formal order suspending benefits based on claimant's refusal to undergo surgery. On February 3, 1993, employer advised the district director that, in the absence of a response to its request for an order suspending benefits, employer had discontinued its voluntary payment of benefits effective January 20, 1993. By letter dated February 10, 1993, the district director upheld employer's suspension of benefits.

In his Decision and Order, the administrative law judge, after initially finding that claimant's refusal to submit to surgery was both unreasonable and unjustified, suspended claimant's benefits pursuant to Section 7(d)(4) of the Act. The administrative law judge found, however, that the district director's retroactive suspension of benefits was inconsistent with the Board's holding in *Dodd v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 245 (1989), and, accordingly, restored total disability benefits to claimant from the date of employer's last payment, January 20, 1993, until the date of the district director's order, February 10, 1993. Lastly, the administrative law judge ordered employer to pay or reimburse claimant for the medical expenses incurred as a result of claimant's June 1992 hospitalization.

On appeal, claimant contends that the administrative law judge's determination that claimant's refusal to undergo surgery was unreasonable and unjustified is neither rational nor supported by substantial evidence. Additionally, claimant has filed a motion to expedite his appeal, contending that he is being forced to undergo "dangerous and life threatening surgery" in order to avoid "desperate financial straits;" additionally, claimant states that he advised employer in October 1994 that he would undergo the aforementioned surgery, but that employer now refuses to authorize that procedure. Employer has responded to claimant's appeal urging affirmance of the administrative law judge's Decision and Order; employer has not, however, responded to claimant's motion to expedite. The Board has determined that this case requires expedited review and, accordingly, has advanced it on the Board's docket. 20 C.F.R. §802.303(b).

The sole issue presented by this appeal is whether the administrative law judge, pursuant to Section 7(d)(4) of the Act, 33 U.S.C. §907(d)(4), properly suspended compensation on the basis that claimant's refusal to undergo surgery was unreasonable and unjustified. Section 7(d)(4) provides:

> If at any time the employee unreasonably refuses to submit to medical or surgical treatment, or to an examination by a physician selected by the employer, the Secretary or administrative law judge may, by order, suspend the payment of further compensation during such time as such refusal continues, and no compensation shall be paid at any time during the period of such suspension, unless the circumstances justified the refusal.

33 U.S.C. §907(d)(4).

The Board has held that Section 7(d)(4) sets forth a dual test for determining whether benefits may be suspended as a result of a claimant's failure to undergo medical or surgical

treatment. *See Hrycyk v. Bath Iron Works Corp.*, 11 BRBS 238 (1979)(Smith, S. dissenting). In *Hrycyk*, the Board held that employer must make an initial showing that the claimant's refusal to undergo medical or surgical treatment is unreasonable; the reasonableness of a claimant's actions must be appraised in objective terms. If employer meets this burden, the burden shifts to claimant to show that the circumstances justify his or her refusal; appraisal of the justification of the claimant's actions is a subjective inquiry. *Id.*, 11 BRBS at 241-243. *See also Dodd*, 22 BRBS at 249.

In considering the merits of claimant's appeal, we must first consider the administrative law judge's determination that claimant's refusal to undergo surgery, specifically a laminectomy, was unreasonable. The Board in *Hrycyk* described the reasonableness determination as follows:

> The first inquiry is into reasonableness. Of course, the recommended procedure or examination must be proven likely, as a matter of reasonable medical probability, to be of aid to a course of treatment designed to relieve the claimant's symptoms and restore a degree of his or her lost earning capacity without undue risk to his or her health or well-being. If this is shown, the claimant's refusal to undergo medical or surgical treatment or to submit to an examination by the employer's physician must be considered unreasonable if an ordinary reasonable person in the claimant's condition and suffering the claimant's pain and physical restrictions would consent to the recommended procedure or examination with minimal hesitation. The converse is true as well: if an ordinary reasonable person would refuse the procedure, the claimant's refusal is reasonable. Broadly stated, the inquiry is: what course would an ordinary person in the claimant's condition pursue after weighing the risks and rewards of the procedure with the alternatives of continued pain and restriction?

11 BRBS at 241-242.

In the instant case, the administrative law judge, in considering the reasonableness prong, first stated that the four reporting physicians, Drs. Staggers, Magliato, Flax, and Kovarsky, plus the three physicians with whom Dr. Staggers consulted, unanimously agreed that surgery is the indicated treatment. *See* Decision and Order at 7. This statement, however, represents a mischaracterization of the evidence. First, the administrative law judge's statement fails to acknowledge that Dr. Magliato on two occasions qualified his opinion by recommending authorization of a laminectomy only if both claimant and Dr. Staggers, claimant's treating orthopedic surgeon, agreed surgery should be performed. *See* Emp. Ex. 3. Similarly, Dr. Kovarsky stated that while the proposed surgery is appropriate, the final decision for or against surgery should be made by the treating physician. *See* Emp. Ex. 4. Moreover, Dr. Flax stated only that "serious thought be given to surgical exploration of [claimant's] L4-5 space." *See* Emp. Ex. 5. In view of their deference to claimant's treating physician's decision, the opinions of Drs. Magliato and Kovarsky cannot be viewed as unequivocal recommendations that claimant undergo a laminectomy. Similarly, the opinion of Dr. Flax cannot be construed as a clear recommendation that claimant undergo a laminectomy.

Moreover, the administrative law judge failed to reconcile his conclusion that the physicians unanimously agreed that surgery is indicated with his subsequent acknowledgement that Dr. Staggers opined, in retrospect, that claimant may have been wise to reject the surgery since his condition did not worsen. *See* Decision and Order at 7. Specifically, the administrative law judge failed to address Dr. Staggers' testimony that claimant's refusal to undergo surgery was "reasonable," which was offered in response to a direct inquiry from the administrative law judge.[2] *See* Hearing Tr. at 82-83.

Furthermore, the administrative law judge, in discussing Dr. Staggers' testimony regarding the possibility that surgery would enhance claimant's earning capacity, *see* Decision and Order at 7, failed to properly apply the standard set forth in *Hrycyk*, *i.e.*, whether the laminectomy was proven likely, as a matter of reasonable medical probability, to be of aid in restoring a degree of claimant's lost earning capacity. 11 BRBS at 241. The administrative law judge concluded, based on Dr. Staggers' testimony that the risks of surgery are slight and the results are favorable in three-quarters or more cases, and claimant's testimony that he currently experiences pain, takes medication which further incapacitates him, and is limited in his ability to travel, that an ordinary reasonable person would not refuse the surgical procedure offered to claimant. *See* Decision and Order at 7.
In rendering this conclusion, however, the administrative law judge failed to address Dr. Staggers' testimony that the laminectomy would alleviate only some, but not all, of claimant's symptoms and that, regardless of whether claimant presently underwent the laminectomy, claimant's inability to return to work was unlikely to change. *See* Hearing Tr. at 31-32, 59-61, 68.

In view of the administrative law judge's failure to address fully the totality of Dr. Staggers' testimony and his revised opinion as to the advisability of claimant's undergoing the surgical procedure initially recommended, as well as Dr. Staggers' opinion regarding the surgery's impact on claimant's post-injury wage-earning capacity, we hold that his conclusion that a reasonable person would not refuse the surgery cannot be affirmed. We therefore vacate the administrative law judge's finding that employer established the reasonableness prong of the *Hrycyk* test, and we remand the case to the administrative law judge for reconsideration of the totality of Dr. Staggers' testimony as well as the other relevant evidence of record regarding this issue.

Claimant additionally contends that the administrative law judge erred in determining that his refusal to undergo a laminectomy was unjustified. In *Hrycyk*, the Board described the second prong of the test as follows:

> The second aspect of the standard focuses narrowly on the individual claimant. The inquiry here is into this particular claimant's reasons for refusing the recommended

[2]Although Dr. Staggers initially recommended that claimant undergo a laminectomy because of his spinal stenosis, *see* Hearing Tr. at 27, 56, he subsequently acknowledged that, as claimant's condition did not deteriorate as a result of his decision not to undergo that surgical procedure, claimant's rejection of the surgery was reasonable and that claimant "might have been smarter than we . . . [since his condition] has remained about the same." *Id.* at 82-83.

> procedure, and the particular circumstances in which the individual decision to refuse the procedure has been made. For example, he or she may have had an unsuccessful result from prior surgery, or may personally know someone who did. He or she may feel too old to risk an operation, if such is the recommended procedure. Another doctor may have told the claimant that the recommended procedure is not necessary. A cautious claimant may feel that it is more important to work with pain at reduced capacity and continue to feed the family rather than take chances. A particular claimant may simply have a paralysing fear of the procedure, which, even though wholly irrational and unacceptable under a standard which looks to the ordinary person, provides sufficient justification for not jeopardizing the mental and emotional health of this particular claimant by forcing consent to the procedure. There may be countless individual subjective reasons why a particular claimant would refuse a recommended procedure. The task of the deputy commissioner when evaluating this aspect of the standard is to take these reasons or apparently irrational responses and make an informed judgment, within his or her broad discretion, concerning whether or not the particular circumstances provide sufficient justification for the individual decision to refuse the procedure.

11 BRBS at 242.

In the instant case, the administrative law judge found claimant's reasons for refusing to undergo a laminectomy to be "transparent, unsubstantiated and unconvincing." *See* Decision and Order at 8. Specifically, the administrative law judge found that the primary reason assigned by claimant for his refusal to undergo surgery was the continuing pain experienced by his wife after she had undergone back surgery; noting claimant's wife's physical capacities, the administrative law judge discredited this rationale. *Id.* The administrative law judge failed, however, to discuss claimant's uncontradicted deposition testimony that the reason he declined the surgery was the physicians' inability to assure him that surgery would enable him to return to work. *See* Emp. Ex. 13 at 27-29, 43, 47-48. Moreover, the administrative law judge failed to explicitly address claimant's testimony that he lacked assurances that surgery would make him better than he currently is and that he distrusted the surgery because too many things can go wrong. *See* Hearing Tr. at 94-95;. We therefore vacate the administrative law judge's finding that claimant's refusal to undergo surgery is unjustified from a subjective standpoint; on remand, if the administrative law judge finds the reasonableness prong met, he must reconsider claimant's deposition and hearing testimony as well as any other evidence relevant to the question of whether claimant's reasons for refusing the laminectomy are justified.

Lastly, we note that the administrative law judge may reopen the record on remand to address the contention made in claimant's motion to expedite that, following issuance of the administrative law judge's Decision and Order suspending compensation, employer refused to authorize the surgery.[3]

[3]As we have determined that the administrative law judge's finding that claimant's refusal to

Accordingly, the administrative law judge's suspension of benefits pursuant to Section 7(d)(4) is vacated, and the case is remanded for reconsideration in accordance with this opinion. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

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undergo surgery was unreasonable and unjustified must be vacated and the case remanded for reconsideration of the relevant evidence, we need not address claimant's alternative argument that the district director's suspension of benefits does not comply with the applicable regulatory requirements.