

KENNETH E. BLAKE)	
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Claimant-Respondent)	
)	
v.)	
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LAKE CHARLES STEVEDORES, INCORPORATED)	DATE ISSUED: <u>FEB 11, 2005</u>
)	
Self-Insured)	
Employer-Petitioner)	DECISION and ORDER

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

Jere Jay Bice (Bice & Palermo), Lake Charles, Louisiana, for claimant.

Scott A. Soule (Chaffe, McCall, Phillips, Toler & Sarpy, LLP), New Orleans, Louisiana, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (03-LHC-0786) of Administrative Law Judge Clement J. Kennington 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant sustained injuries while working as a longshoreman for employer on August 9, 2002. Claimant continued to work through August 23, 2002, at which time he reported the accident to his supervisor and requested medical treatment. Claimant saw Dr. Nabours on August 23, 2002, at which time he complained of pain in his back, neck, shoulder, right foot and right hand. X-rays of his back revealed mild scoliosis in the thoracic spine. Dr. Nabours referred claimant to Dr. Perry, an orthopedic surgeon, who

on September 30, 2002, diagnosed degenerative disc disease, cervical herniated nucleus pulposus and a lumbar strain, recommended physical therapy and steroid injections, and removed claimant from work until October 17, 2002. On that date, Dr. Perry again recommended steroid injections which claimant refused. Dr. Perry therefore reported, on October 25, 2002, that claimant reached maximum medical improvement as of October 17, 2002. Dr. Perry also suggested that claimant seek an opinion elsewhere.

Claimant subsequently sought treatment from Dr. Odenheimer, a neurologist, who diagnosed claimant with a cervical strain, disc disease and muscle spasm, as well as neck, back and bilateral shoulder pain, and referred claimant to an orthopedic surgeon, Dr. Bernauer. Claimant treated with Dr. Bernauer between December 2, 2002, and August 11, 2003; he diagnosed disc herniations at C4-5, C5-6, C6-7, and T5-6, and disc bulges at L4-5, and L5-S1, and recommended an anterior cervical discectomy and fusion as well as pain management. Claimant, however, did not attend any pain management sessions because employer refused to approve it. Dr. Bernauer thereafter opined, as of August 11, 2003, that claimant was totally disabled and could not undergo a Functional Capacity Examination (FCE) until he received the recommended treatment. Employer voluntarily paid temporary total disability benefits from August 24, 2002, until October 16, 2002, and permanent partial disability benefits from October 17, 2002, until February 15, 2003. Claimant, who has not worked since August 23, 2002, filed a claim seeking additional benefits under the Act.

In his decision, the administrative law judge initially determined, based on the undisputed evidence, that claimant cannot return to his usual employment as a longshoreman and thus has established a *prima facie* case of total disability. The administrative law judge next found, based on Dr. Bernauer's opinion that claimant cannot perform any work, that claimant is entitled to temporary total disability benefits as of August 24, 2002, and continuing. With regard to medical treatment, the administrative law judge concluded that Drs. Nabours and Perry were employer's physicians, not freely chosen by claimant. The administrative law judge thereafter concluded that as employer rejected claimant's requests for authorization of treatment by Drs. Odenheimer and Bernauer, and since the treatment they rendered was reasonable and necessary, claimant is entitled to medical benefits related to his visits to Drs. Odenheimer and Bernauer.

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

Employer argues that, in contrast to the administrative law judge's findings, claimant reached maximum medical improvement with regard to his work injuries as of October 17, 2002. In support of its position, employer puts forth the October 25, 2002, report of Dr. Perry, wherein he stated that claimant "has exhausted my abilities to make him better," Employer's Exhibit (EX) 2, and thus opined that claimant reached maximum

medical improvement with regard to his work injuries. The determination of when maximum medical improvement is reached is primarily a question of fact based on medical evidence. *Eckley v. Fibrex & Shipping Co., Inc.*, 21 BRBS 120 (1988); *Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988). A claimant's condition may be considered permanent when it has continued for a lengthy period and appears to be of lasting and indefinite duration, as opposed to one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969). A finding of fact establishing the date of maximum medical improvement must be affirmed if it is supported by substantial evidence. *See Mason v. Bender Welding & Machine Co.*, 16 BRBS 307 (1984).

In the instant case, the administrative law judge determined that employer's reliance on Dr. Perry's opinion that claimant reached maximum medical improvement on October 17, 2002, is "shortsighted," Decision and Order at 24, as Dr. Perry did not indicate that claimant's condition had stabilized or that further medical treatment was not necessary.¹ Rather, the administrative law judge found that Dr. Perry's statement that claimant reached maximum medical improvement as of October 17, 2002, is premised entirely on the physician's assessment that he could not assist claimant any longer. In this regard, the administrative law judge inferred that Dr. Perry's suggestion that claimant seek a second opinion, as noted in his medical report dated October 17, 2002, was indication of his belief that claimant remained in need of further treatment.² Moreover, the administrative law judge found that claimant was admitted to the emergency room on October 27, 2002, complaining that his pain was getting worse, shortly after he had allegedly reached maximum medical improvement, that Dr. Odenheimer diagnosed claimant with radiculopathy on December 17, 2002, and that Dr. Bernauer, in January 2003, discovered lumbar disc bulges and additional disc herniations prompting him to state that claimant's thoracic spine is in need of additional treatment. The administrative law judge's weighing of the evidence is rational, and his finding that claimant's work-related injuries have not yet reached maximum medical improvement is affirmed, as the record establishes that claimant is undergoing treatment with a view toward improving

¹ In fact, Dr. Perry had recommended at that time that claimant undergo continued treatment in the form of physical therapy and epidural steroid injections, EX 2; EX 7 at 9-13, and further stated that he released claimant from his care solely because he "couldn't make any progress," with claimant. EX 7 at 13. At the time of his deposition on May 12, 2003, Dr. Perry stated that he could not give any opinion as to whether claimant was in need of the back surgery recommended by Dr. Odenheimer. EX 7 at 18-19.

² In his deposition, Dr. Perry reiterated his position that he said "for [claimant] to see someone else," and to "[s]eek an [medical] opinion elsewhere." EX 7 at 13, 23.

his work-related condition. *See generally Louisiana Ins. Guaranty Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994), *aff'g* 27 BRBS 192 (1993); *Leech v. Service Engineering Co.*, 15 BRBS 18 (1982); *Lusby v. Washington Metropolitan Area Transit Authority*, 13 BRBS 446 (1981).

Employer next asserts that the opinions of Drs. Nabours and Perry regarding claimant's condition are relevant to claimant's ability to perform suitable alternate employment. In particular, employer avers that Dr. Perry's testimony that claimant was, as of October 17, 2002, physically qualified to perform the alternate work listed in employer's labor market survey is sufficient to meet its burden to establish suitable alternate employment. In addition, employer contends that the labor market survey of Ms. Favaloro establishes suitable alternate employment.

Where, as in the instant case, claimant establishes that he is unable to return to his usual work, the burden shifts to employer to demonstrate the availability of realistic job opportunities within the geographic area where claimant resides, which claimant, by virtue of his age, education, work experience, and physical restrictions, is capable of performing and for which he can compete and reasonable secure. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *see also P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116 (5th Cir. 1991).

In his decision, the administrative law judge determined that while the jobs identified by Ms. Favaloro "more or less" fall within Dr. Perry's dated restrictions of light to sedentary work,³ they do not fit within Dr. Bernauer's more current opinion that claimant cannot perform any work. The administrative law judge accorded greatest weight to the opinion of Dr. Bernauer that claimant is not capable of any work at this time since, as claimant's treating physician, he has seen claimant more recently and has the advantage of additional testing, and his conclusion is more consistent with the physician's actual findings and claimant's testimony regarding his physical restrictions. Such a determination is within the administrative law judge's discretion as the trier-of-fact. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2^d Cir. 1961); *Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996). Moreover, notwithstanding the existence of medical evidence and testimony that claimant is capable of some employment, an

³ The administrative law judge specifically found that Ms. Favaloro's labor market survey relied solely upon the work restrictions imposed by Dr. Perry and did not consider the opinion expressed by Dr. Bernauer that claimant is incapable of performing any work. Decision and Order at 26. Moreover, the administrative law judge recognized that Dr. Perry did not assign any work restrictions to claimant until May 2003, eight months after he last saw claimant, and that even then, Dr. Perry "expressed hesitation" in assigning those restrictions given the lapse in time. Decision and Order at 26; *see also* EX 7 at 13.

administrative law judge may rationally credit other medical evidence that claimant is unable to perform any alternate work and is therefore totally disabled. *See generally Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991); *Lostanau v. Campbell Industries, Inc.*, 13 BRBS 227 (1981), *rev'd on other grounds sub nom. Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983). Consequently, as the administrative law judge rationally accorded greatest weight to the opinion of Dr. Bernauer that claimant is incapable of any work, as supported by claimant's testimony regarding his physical restrictions, we affirm the administrative law judge's conclusion that employer did not establish the availability of suitable alternate employment. Consequently, the administrative law judge's finding that claimant is entitled to temporary total disability benefits as of August 24, 2002, and continuing, is affirmed.

Employer further asserts that the administrative law judge erred in awarding medical benefits for the treatment rendered by Drs. Odenheimer and Bernauer. Employer first asserts that, contrary to the administrative law judge's finding, claimant explicitly and freely elected Dr. Nabours as his treating physician and thus that the administrative law judge's subsequent classification of Drs. Odenheimer and Bernauer as claimant's treating physicians is erroneous. Employer also argues that it is not liable for the payment of any medical expenses for services rendered by Drs. Odenheimer and Bernauer because claimant did not obtain prior authorization for such treatment. Furthermore, employer asserts that it is not liable for any treatment provided by Dr. Bernauer because he did not submit the requisite medical report to employer within ten days as required by Section 7(d)(2) of the Act, 33 U.S.C. §907(d)(2).

Under the Act, an employer is liable for all reasonable and necessary medical expenses related to the work injury. 33 U.S.C. §907(a); *see Ballesteros*, 20 BRBS 184. A claimant is entitled to his initial free choice of physician. 33 U.S.C. §907(b); *Hunt v. Newport News Shipbuilding & Dry Dock Co.*, 28 BRBS 364, *aff'd mem.*, 61 F.3d 900, 29 BRBS 105(CRT) (4th Cir. 1995); *Senegal v. Strachan Shipping Co.*, 21 BRBS 8, 11 (1988). Section 7(d) of the Act, 33 U.S.C. §907(d), sets forth the prerequisites for an employer's liability for payment or reimbursement of medical expenses incurred by claimant. The Board has held that Section 7(d) requires that a claimant request his employer's authorization for medical services performed by any physician, including the claimant's initial choice. *See Maguire v. Todd Shipyards Corp.*, 25 BRBS 299 (1992); *Shahady v. Atlas Tile & Marble*, 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 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 necessary for his injury in order to be entitled to such treatment at

employer's expense. *See Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989).

The administrative law judge, after acknowledging that “there is evidence to support both sides of [the] argument,” as to whether Dr. Nabours and, by referral, Dr. Perry, were claimant's free choice of physician, Decision and Order at 27, determined that the relevant testimony of employer's witnesses, Mr. Arceneaux and Mr. Biven, contradict each other on this subject with regard to two key points. First, the administrative law judge found that while Mr. Arceneaux, whose position as Regional Claims Director for P & O Port includes adjusting claims arising out of employer's operations, stated that employees can list whichever doctor they want on the Choice of Physician form, Mr. Biven, who is employer's office manager, stated that if the employee does not choose Dr. Nabours, he will not fill out the form at all. Claimant's Exhibit (CX) 15 at 28-29. Second, the administrative law judge found that while Mr. Arceneaux testified that employer does not send the employees to any particular doctor, Mr. Biven stated that all injured employees must see Dr. Nabours, CX 15 at 26, and this testimony is consistent with Ms. Manuel's statement that Dr. Nabours is employer's company doctor. CX 16 at 7. Given that Mr. Arceneaux had only been working as employer's claims adjuster since May 2002, while Mr. Biven has been with employer for 35 years, the administrative law judge elected to accord greater weight to Mr. Biven's testimony. This factor, in conjunction with the corroborating testimony by claimant and Ms. Manuel regarding employer's close relationship with Dr. Nabours and the specific events which unfolded upon claimant's report of his work injury,⁴ supports the administrative law judge's conclusion that Dr. Nabours was employer's physician and not chosen by claimant and his consequent determination that “as a natural extension of this relationship,” Decision and Order at 28, Dr. Perry was likewise employer's physician and not chosen by claimant. As the administrative law judge extensively reviewed and

⁴ The administrative law judge found that: claimant, employer's office manager Tom Biven, and a data entry clerk, Cathy Manuel, all testified that Dr. Nabours' name was pre-typed on the form by employer, Hearing Transcript (HT) at 156, CX 15 at 17-22, CX 16 at 6-7; claimant testified that Mr. Biven's abrupt demeanor at the time he reported the accident led him to believe that he had to sign the forms in order to get medical treatment, HT at 156, 158; Ms. Manuel testified that she told claimant that he “needed to sign the form,” CX 16 at 11, and that Dr. Nabours is employer's “company doctor,” CX 16, at 7; and Mr. Biven testified that employer has a close working relationship with Dr. Nabours in that the doctor will see injured workers within two to three hours, that Dr. Nabours is the only physician which employer recommends to its injured employees, and that all injured employees must see Dr. Nabours with regard to their work-related injuries, regardless of whether they choose him as their physician, CX 15 at 17-22, 28-30. Decision and Order at 27-28.

considered the conflicting evidence with regard to the issue of claimant's free choice of physician, and his credibility determinations in finding that Drs. Nabours and Perry are employer's rather than claimant's physicians are rational, his consequent determination that these physicians do not represent claimant's "free choice" of physician is affirmed.⁵ See *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 U.S. 954 (1963); see also *Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994); *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 30(CRT) (9th Cir. 1988).

The administrative law judge next found that as the parties stipulated that claimant requested, and employer refused, authorization to treat with both Dr. Odenheimer and Bernaur, employer is liable for all reasonable and necessary treatment rendered by those physicians with regard to claimant's work-related injuries. HT at 244-246. The administrative law judge then found that claimant established a *prima facie* case that the treatment proffered by Drs. Odenheimer and Bernauer was both reasonable and necessary as Dr. Bernauer recommended a specific course of treatment for recovery of claimant's injury, *i.e.*, pain management and, if necessary, surgery, and claimant is willing to follow Dr. Bernauer's recommendations. HT at 127-130. In addition, the administrative law judge found that employer put forth no substantial evidence to support its position that this recommended treatment is not reasonable or necessary. Accordingly, the administrative law judge found that claimant is entitled to medical benefits for treatment provided by Drs. Odenheimer and Bernauer. We affirm the administrative law judge's findings in this regard as they are rational, supported by substantial evidence and in accordance with law. See *Schoen*, 30 BRBS at 112; *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87 (1989).

⁵ In *Hunt v. Newport News Shipbuilding & Dry Dock Co.*, 28 BRBS 364, *aff'd mem.*, 61 F.3d 900, 29 BRBS 105(CRT) (4th Cir. 1995) and *Senegal v. Strachan Shipping Co.*, 21 BRBS 8, 11 (1988), the Board affirmed the administrative law judges' determinations that the doctors which claimants first saw for treatment and with whom the claimants continued to seek treatment until they were released to return to work, represented their first choice of physician. The instant case is distinguishable on several grounds. First, in contrast to *Hunt*, claimant's treatment period with Dr. Nabours and Dr. Perry was brief, *i.e.*, August 23, 2002, to October 25, 2002, as opposed to two years. In addition, unlike the claimants in *Hunt* and *Senegal*, neither Dr. Nabours nor Dr. Perry opined that claimant's work injury had completely resolved or indicated that claimant could return to work full duty. Rather, Dr. Perry indicated, on October 25, 2002, that claimant is not physically capable of returning to his pre-injury occupation as a longshoreman, and it was not until his deposition, on May 12, 2003, after reiterating that claimant could not perform his pre-injury work, that Dr. Perry indicated that claimant may be capable of light sedentary work. EX 7 at 13-15.

Under Section 7(d)(2), an employer is not liable for medical expenses unless, within 10 days following the first treatment, the physician rendering such treatment provides the employer with a report of that treatment. 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 & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir.), *cert. denied*, 479 U.S. 826 (1986); *Force v. Kaiser Aluminum & Chemical Corp.*, 23 BRBS 1 (1989), *aff'd in part*, 938 F.2d 981, 25 BRBS 13(CRT) (9th Cir. 1991); 20 C.F.R. §702.422.⁶ 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., concurring in part and dissenting in part); *Toyer v. Bethlehem Steel Corp.*, 28 BRBS 347 (1994)(McGranery, J., dissenting). Therefore, this case must be remanded to the district director for consideration of this matter, as the authority to excuse untimely filing is a discretionary decision which rests with the district director and there is no evidence that the district director considered this issue. *Toyer*, 28 BRBS at 353-54. Accordingly, we must vacate the administrative law judge's finding that "it [is] within the purview of my discretion as an administrative law judge to excuse Dr. Bernauer's failure to provide employer with medical reports within 10 days of treatment," Decision and Order at 35, as well as his award of medical expenses for the treatment provided by Dr. Bernauer, and remand the case to the district director for a decision as to whether his failure to file an attending physician report should be excused under the terms of Section 7(d)(2) of the Act and Section 702.422(b) of the regulations.

Employer lastly contends that claimant's refusal to continue the course of steroid injection treatments recommended by Dr. Perry as well as claimant's "irrational" refusal to comply with employer's reasonable request to submit to an FCE,⁷ serve as sufficient grounds to suspend the payment of additional benefits. Section 7(d)(4) provides that an administrative law judge may, by order, suspend the payment of compensation to an employee during any period in which he unreasonably refuses to submit to medical or

⁶ The implementing regulation, Section 702.422(b), 20 C.F.R. §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

⁷ Employer also alludes to claimant's refusal to undergo surgery initially recommended by Dr. Bernauer. However, the record establishes that claimant was skeptical about the surgery and that after discussions with Dr. Bernauer, they jointly decided on the more conservative path of pain management. HT at 127-130.

surgical treatment, unless the circumstances justified the refusal. 33 U.S.C. §907(d)(4).⁸ Section 7(d)(4) requires a dual inquiry. Initially, employer must establish that claimant's refusal to undergo medical treatment is unreasonable; if employer does so, the burden shifts to claimant to establish that circumstances justified the refusal. For purposes of this test, the reasonableness of claimant's refusal has been defined by the Board as an objective inquiry, while claimant's justification for refusing has been defined as a subjective inquiry focusing on the individual claimant. See *Dodd v. Crown Central Petroleum Corp.*, 36 BRBS 85 (2002); *Malone v. Int'l Terminal Operating Co., Inc.*, 29 BRBS 109 (1995); *Dodd v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 245 (1989); *Hrycyk v. Bath Iron Works Corp.*, 11 BRBS 238 (1979)(Smith, S., dissenting).

In the instant case, the administrative law judge initially found that “an ordinary and reasonable person would express hesitation in receiving steroid injections in his neck and back and [would] wish to explore other treatment options first.” Decision and Order at 34. The administrative law judge further observed that steroid injections result in some unpleasant side effects and do not necessarily improve a person's pain. Consequently, the administrative law judge properly determined that employer has not carried its burden of proving that claimant's refusal to undergo such treatment is objectively unreasonable. The administrative law judge found that claimant put forth sufficient justification for his refusal, *e.g.*, he did not like taking steroids, similar injections only temporarily helped his foot and hand injuries, and he did not like the side effects. See *Hrycyk*, 11 BRBS 238. Accordingly, the administrative law judge concluded that employer is not entitled to a suspension of benefits on this basis. The administrative law judge also rejected employer's assertion that claimant's refusal to undergo an FCE is unreasonable and thus serves as a sufficient basis to suspend benefits, based on the Board's decision in *Simpson v. Terminal of California*, 15 BRBS 187 (1982), wherein the Board held that neither the Act nor its corresponding regulations require that a claimant undergo rehabilitation training. See also *Mendez v. Bernuth Marine Shipping, Inc.*, 11 BRBS 21 (1979), *aff'd on other grounds*, No. 79-3504 (5th Cir. Feb. 13, 1981). Moreover, the administrative law judge relied on the fact that claimant's treating physician, Dr. Bernauer, to whom the administrative law judge accorded greatest weight, opined that claimant is unable to

⁸ Section 7(d)(4), 33 U.S.C. §907(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.

undergo an FCE at this time, and concluded that, as an FCE can be physically exhausting and a strenuous undertaking, sometimes worsening a person's physical condition in the process, claimant's refusal to undergo it is hardly unreasonable. Decision and Order at 34-35. As the administrative law judge's finding that employer has not established that claimant's refusal to undergo medical treatment is unreasonable is rational and supported by substantial evidence, we affirm his consequent rejection of employer's request for the suspension of claimant's benefits.

Accordingly, the administrative law judge's determination excusing Dr. Bernauer's failure to provide a medical report within ten days is vacated, and the case is remanded to the district director for consideration of whether the delay in filing his initial medical report should be excused. In all other regards, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge