BRB No. 07-0923

M.B.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
TITAN MAINTENANCE & CONSTRUCTION COMPANY	)	DATE ISSUED: 07/24/2008
	)	
and	)	
	)	
LOUISIANA WORKERS' COMPENSATION CORPORATION	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order of Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

Marcus J. Poulliard (Frischhertz & Associates), New Orleans, Louisiana, for claimant.

David K. Johnson (Johnson, Stiltner & Rahman), Baton Rouge, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (2006-LHC-758) of Administrative Law Judge Patrick M. Rosenow 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 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 was employed as a blaster/painter foreman by LA Technical Services (LA Tech) in August 2001. Claimant alleged that LA Tech was a subcontractor of Titan Maintenance and Construction (employer, Titan), who was in turn contracted to provide painting services for a ferry restoration project headed by Kostmayer Construction (Kostmayer). Initially, claimant's duties entailed blasting and painting components for a ferry landing in the Kostmayer yard. Eventually, the work site changed to the ferry landing, where, on October 23, 2001, claimant fell about 15 to 18 feet from a ladder and landed on his buttocks.

Claimant sought medical treatment at the hospital, and it was recommended that he be seen by a specialist. Dr. Phillips, an orthopedist, recommended that claimant have an MRI of his back to facilitate a diagnosis. However, before the MRI was performed, claimant received a "choice of physician" form from Titan's carrier. Claimant testified that it was his understanding that Dr. Phillips was not covered by employer's insurance, HT at 36-37, and he thus indicated his choice of either Dr. Phillips or Dr. Nelson. Claimant began conservative treatment with Dr. Nelson, who also referred claimant to Dr. Culicchia, a neurosurgeon, and Dr. Katz, an orthopedist; the parties stipulated that claimant was totally disabled until April 2, 2002. Claimant attempted to work after he was released for full duty by Dr. Katz, but claimant could not work a full day. He requested reinstatement of benefits and authorization for treatment with Dr. Phillips. Carrier, however, denied further medical or compensation benefits on the basis that Titan was not claimant's employer. Decision and Order at 21. Claimant has not returned to work and sought benefits under the Act, including reimbursement for medical treatment provided by Dr. Phillips, and his successor, Dr. Adatto.

In his Decision and Order, the administrative law judge found that the business records indicate that on the day of claimant's injury, LA Tech was a subcontractor of Titan. In addition, the administrative law judge found that LA Tech did not secure the payment of compensation under the Act. Thus, he concluded that Titan is liable for the payment of compensation pursuant to Section 4(a) of the Act, 33 U.S.C. §904(a). The administrative law judge rejected Titan's contention that it did not have notice of claimant's injury pursuant to Section 12 of the Act, 33 U.S.C. §912, as claimant immediately notified Jimmy Bullias, who worked directly with Titan. In addition, Mr. Bullias notified carrier within 30 days of the date of the injury and employer made no allegation of prejudice due to any late notice. The administrative law judge also credited the opinions of Drs. Phillips and Adatto to find that claimant could not return to his former duties following the injury. Thus, as Titan offered no evidence of suitable alternate employment, the administrative law judge found that claimant was temporarily totally disabled from the date of injury to September 7, 2004, the date of maximum medical improvement, and permanently totally disabled thereafter.

The administrative law judge also found that claimant requested authorization for a change of physician so that he could be treated by Dr. Phillips and that employer refused to grant authorization. Therefore, the administrative law judge found that claimant was no longer required to seek authorization for treatment by Dr. Phillips, and his successor Dr. Adatto, and that as their treatment was reasonable and necessary for claimant's work-related injury, employer must reimburse claimant for the cost of treatment, including the anterior lumbar fusion claimant underwent on August 9, 2003. The administrative law judge addressed employer's contention that Dr. Phillips and Dr. Adatto failed to file timely reports of treatment and thus that employer should not be liable for these medical expenses. *See* 33 U.S.C. §907(d)(2). The administrative law judge found that the district director must determine whether there was good cause to excuse the failure to file the first reports of treatment and thus remanded the case for further findings on this issue.[1]

Titan contends on appeal that the administrative law judge erred in finding that LA Tech was a subcontractor of Titan, and thus, as LA Tech did not secure payment of compensation under the Act, that Titan is liable for claimant's benefits. Titan also contends that the administrative law judge erred in finding that it was given sufficient notice of the injury pursuant to Section 12 of the Act and that claimant suffered no more than a soft-tissue injury which resolved without lasting disability. Titan also contends that the administrative law judge erred in finding it liable for treatment provided by Drs. Phillips and Adatto, as this treatment was not authorized and as it was prejudiced by the physicians' failure to file timely reports of treatment. Claimant responds, urging affirmance of the administrative law judge's decision. In addition, claimant requests that the Board strike that portion of Titan's appeal concerning Section 7(d)(2) as employer did not appeal the district director's order excusing the physicians' failure to file first reports of treatment.

[1] On remand, the district director found that the carrier knew that claimant was treating with Drs. Phillips and Adatto because it paid for some of their treatment. *See* Order on Remand-Medical Issues, Case No. 07-162603 (Oct. 16, 2007). In addition, the district director found that carrier knew about the proposed surgery as it was a disputed issue at the informal conference. The district director excused the failure to file the reports in a timely manner and rejected employer's contention that it was prejudiced by this failure. Thus, employer was found to be responsible for the payment of treatment by Drs. Phillips and Adatto. *See* discussion, *infra.*

Titan first contends that the administrative law judge erred in finding it liable for claimant's benefits as there was no contractor/subcontractor relationship between Titan and LA Tech.[2] Section 4(a) of the Act provides in relevant part:

> In the case of an employer who is a subcontractor, the contractor shall be liable for and shall secure the payment of such compensation to employees of the subcontractor unless the subcontractor has secured such payment.

33 U.S.C. §904(a). In the present case it is undisputed that claimant was hired by LA Tech, and that LA Tech was not insured for workers' compensation cases arising under the Act. Thus, Titan is liable for claimant's benefits if LA Tech was Titan's subcontractor within the meaning of the statute.

The United States Court of Appeals for the Fifth Circuit within whose jurisdiction this case arises, has discussed liability under this section:

> [S]ection 904(a) premises liability on a finding that the principal is subject to some contractual obligation, which it, in turn, passed in whole or in part to the subcontractor.
>
> * * *
>
> The LHWCA distinguishes between employers who are owners and those who are general contractors working under contractual obligations to others.

Sketoe v. Exxon Co., USA, 188 F.3d 596, 598-599, 33 BRBS 151, 152-154(CRT) (5th Cir. 1999), *cert. denied*, 529 U.S. 1057 (2000). Citing Black's Law Dictionary, the court held that the term "contractor" applies

> to any person who enters into a contract, but is commonly reserved to designate one who, for a fixed price, undertakes to procure the performance of works or services on a large scale, or the furnishing of goods in large quantities, whether for the public or a company or individual. *Such are generally classified as general contractors (responsible for entire job) and*

[2] It is clear that claimant was not an employee or borrowed employee of Titan, nor did claimant so contend, and the administrative law judge's finding that Titan is liable for benefits does not rest on either of these theories.

> *sub-contractors (responsible for only portion of job*; e.g., *plumber, carpenter).*

Sketoe, 188 F.3d at 598, 33 BRBS at 152(CRT), citing Black's Law Dictionary 295 (5th ed. 1979) (emphasis in original). Similarly, the United States Court of Appeals for the District of Columbia Circuit considered a case in which the contract specifically disclaimed any employer/employee relationship between the general employer and claimant's immediate employer and its employees. *Director, OWCP v. National Van Lines, Inc. [Riley]*, 613 F.2d 972, 11 BRBS 298 (D.C. Cir. 1979), *cert. denied*, 448 U.S. 907 (1980). The court held that the terminology used in the agreement between the employers was not dispositive and looked to other evidence to define the relationship. The court held that a general employer will be held secondarily liable for workmen's compensation when the injured employee was engaged in work either that is a subcontracted fraction of a larger project or that is normally conducted by the general employer's own employees rather than by independent contractors. In that case, the court concluded that the general employer contracted with claimant's immediate employer to perform work that would normally have been performed by the general's own employees and was a fraction of its overall obligation to other parties. *Id.*, 613 F.2d at 987, 11 BRBS at 318.

As there is no contract in the record which specifically states the relationship between LA Tech and Titan, the administrative law judge reviewed the other evidence and found that LA Tech was a subcontractor of Titan's. Specifically, the administrative law judge found that Kostmayer was hired by the State of Louisiana, Department of Transportation and Development, to work on the Belle Chase/Scarsdale ferry landings. Kostmayer had seven employees and 13 subcontractor workers on the job, including two painters. Cl. Ex. 15. The subcontractors were W. Barnes (running conduit), Rockport (compacting road base), and Titan (painting piles on Scarsdale side). Cl. Ex. 16. LA Tech was hired to do painting as evidenced by a payment from Titan to LA Tech on September 17, 2001. *Id.* Specifically, the record contains an invoice from Titan to Kostmayer for money paid by Titan to LA Tech with the header "checks pd. to subs.," and is entitled by the underscored word "Subcontractors." Cl. Ex. 15. In response to a request for documents in a civil case requesting information about the equipment and supplies provided to its employees, Titan responded that it did not have any employees on the job in question. Titan also responded that Anthony J. Bua, Jr. was responsible for Titan's record keeping and overseeing the completion of the ferry landing job through Roland Orgeron and Jimmy Bullias of LA Tech. Claimant testified that he had been instructed by Mr. Bullias to move from Kostmayer's yard to the ferry landing. While at the ferry landing, claimant was supervised by a Kostmayer employee. Cl. Exs. 16, 17.

After reviewing this evidence, the administrative law judge rationally concluded that LA Tech was a subcontractor for Titan on a larger project contracted by Kostmayer. Decision and Order at 19-20. This finding is supported by the invoice and the evidence regarding personnel on the job site. Thus, as it is uncontested that LA Tech did not secure the payment of compensation under the Act, the administrative law judge properly found that Titan is liable for payment of claimant's benefits pursuant to Section 4(a). We affirm the administrative law judge's finding as it is based on rational inferences from the evidence presented and is supported by substantial evidence. *Sketoe,* 188 F.3d at 598, 33 BRBS at 152(CRT); *Riley*, 613 F.2d at 987, 11 BRBS at 318.

Employer also contends that claimant did not give it timely notice of his injury pursuant to Section 12(a), 33 U.S.C. §912(a), as Mr. Bullias was not employer's agent. Failure to provide timely or adequate notice of an injury, as required by Section 12(a), bars a claim unless this failure is excused under Section 12(d) of the Act, 33 U.S.C. §912(d).[3] Claimant's failure to give employer timely written notice of his injury pursuant to Section 12(a) of the Act is excused if employer had knowledge of the injury or employer was not prejudiced by the failure to give proper notice. 33 U.S.C. §912(d)(1), (2). Pursuant to Section 20(b), 33 U.S.C. §920(b), it is presumed that claimant gave employer timely notice of his injury. *Shaller v. Cramp Shipbuilding & Dry Dock Co.,* 23 BRBS 140 (1989).

In this case, the administrative law judge found that claimant immediately notified Mr. Bullias of the injury on October 23, 2001. As previously noted, Mr. Bua, a co-owner of Titan, was responsible for the oversight and control of LA Tech's work through Mr. Bullias. Mr. Bullias notified carrier as soon as it became apparent that claimant would have medical expenses that were larger than originally expected. Indeed, carrier sent claimant a choice of physician form on November 2, 2001, well within 30 days from the date of the accident. CX-2; EX-4. Moreover, the administrative law judge found, and employer does not contest on appeal, that employer did not allege any prejudice due to any alleged late notice of injury. Therefore, as it is rational, supported by substantial evidence, and in accordance with law, we affirm the administrative law judge's finding that the claim is not barred pursuant to Section 12 as employer had actual knowledge of the injury and employer was not prejudiced by any late notice. *See Vinson v. Resolve Marine Services,* 37 BRBS 103 (2003); *Bustillo v. Southwest Marine, Inc.*, 33 BRBS 15 (1999).

[3] Pursuant to Section 12(a) of the Act, claimant must give employer written notice of his injury within 30 days after the injury or after the date claimant is aware or should have been aware of a relationship between the injury and the employment.

With regard to the extent of claimant's injury, employer contends that claimant's work-related injury resolved, and that he was released by Dr. Katz to return to full duty with no restrictions as of April 2, 2002. Employer relies on the medical records of Drs. Nelson, Katz and Culicchia. Dr. Nelson diagnosed contusions and lower back strain and treated claimant conservatively with physical therapy and medication. He released claimant for return to full-duty work on December 10, 2001, which claimant attempted unsuccessfully. Emp. Ex. 6. Subsequently, Dr. Nelson imposed restrictions with limited lifting, bending, stooping, pushing and squatting. *Id.* Dr. Nelson referred claimant to Dr. Culicchia, a neurosurgeon, who stated that he could find no neurological injury or disease. Dr. Culicchia did not address whether claimant could return to work. Emp. Ex. 2. Dr. Nelson then referred claimant to Dr. Katz, who diagnosed claimant as suffering from mechanical low back pain and coccydynia and recommended conservative treatment. Emp. Ex. 1. Dr. Katz released claimant for full duty as of April 2, 2002. *Id.*

The record also contains the reports of Drs. Phillips, Adatto, and Murphy. After claimant attempted unsuccessfully to return to work in April 2002, he requested to treat with Dr. Phillips. Dr. Phillips opined that claimant suffered from a lower lumbar disc herniation and a bilateral inguinal hernia. He stated that claimant was a candidate for an anterior lumbar fusion and that he was unable to return to work pending surgery. Cl. Ex. 9. Claimant was examined by an independent medical examiner, Dr. Murphy, who stated that claimant had a disc herniation at L5-S1 and that surgery may be reasonable if claimant has radiculopathy. Dr. Murphy recommended that claimant undergo EMG and nerve conduction studies. Cl. Ex. 6. Dr. Adatto assumed Dr. Phillips's practice when the latter retired. He reviewed the results of the EMG and diagnosed that claimant had a torn bulging disc which resulted in nerve damage and required surgery. Cl. Ex. 10. Dr. Adatto performed an anterior lumbar fusion on August 9, 2003. Following the surgery, claimant continues to complain of pain in the small of his back, although the pain in his leg was relieved by the surgery. Claimant is currently under treatment with a pain management specialist, Dr. Lesser. Dr. Adatto restricted claimant from repetitive stooping, bending, lifting objectives of more than 10 to 20 pounds, and staying seated or standing for more than 45 minutes. Cl. Ex. 10.

The administrative law judge accorded determinative weight to the opinions of Drs. Phillips and Adatto as they treated claimant for the longest period and their opinions are supported by that of Dr. Murphy. While the physicians who examined claimant closer to the time of the work-related accident opined that he suffered only a soft-tissue injury from which he had recovered, the administrative law judge rationally credited claimant's testimony that he had requested the release for full-duty work from Dr. Katz, but that he was unable to perform his duties. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). In addition, the opinions of Drs. Phillips and Adatto constitute substantial evidence in support of the

administrative law judge's finding that claimant cannot return to his former employment due to his work-related injury. *See Diamond M Drilling Co. v. Marshall*, 577 F.2d 1003, 8 BRBS 658 (5th Cir. 1978). As employer has submitted no evidence of suitable alternate employment, we also affirm the administrative law judge's finding that claimant is entitled to permanent total disability benefits. *See Hite v. Dresser Guiberson Pumping*, 22 BRBS 87 (1989).

Employer next contends that the administrative law judge erred in holding it liable for the medical treatment provided by Drs. Phillips and Adatto. An employee cannot receive reimbursement for medical expenses under Section 7 unless he has first requested authorization, prior to obtaining the treatment, except in cases of emergency or refusal. 33 U.S.C. §907(d)(1). Once employer has refused to provide treatment or to satisfy claimant's request for treatment, claimant is released from the obligation of continuing to seek employer's approval. *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). Claimant then need only establish that the treatment subsequently procured on his own initiative was necessary for treatment of the injury, in order to be entitled to such treatment at employer's expense. *Id.; see Lopez v. Stevedoring Services of America*, 39 BRBS 85 (2005); *Ranks v. Bath Iron Works Corp.*, 22 BRBS 301 (1989).

Claimant initially indicated on his "Choice of Physician" form that he wished to be treated by either Dr. Phillips or Dr. Nelson. He was examined initially by Dr. Phillips on October 29, 2001. Claimant testified that he was told by carrier that Dr. Phillips was not on a list of providers and that it would be better for him to be treated by Dr. Nelson. H. Tr. at 36-37. Thus, claimant began treatment with Dr. Nelson. Dr. Nelson subsequently referred claimant to Dr. Culicchia, a neurosurgeon, and to Dr. Katz, an orthopedist.

After being released for full duty by Dr. Katz, claimant unsuccessfully attempted to return to work. However, as he was unable to perform his usual duties due to continuing pain, he contacted carrier by letter dated April 23, 2002, requesting a reinstatement of compensation benefits and medical treatment with Dr. Phillips, an orthopedist. There is no evidence that carrier replied to claimant's request. However, the record contains a letter dated January 28, 2003, from carrier's representative to employer stating that carrier had stopped activity on the claim as claimant was not an employee of Titan. Cl. Ex. 22. Claimant had begun treatment with Dr. Phillips on July 25, 2002. Dr. Phillips subsequently retired and Dr. Adatto took over his practice, including the care of claimant. The administrative law judge found that employer responded to claimant's request for treatment with Dr. Phillips by stating that the claim had been closed as Titan was denying it was the responsible employer. The administrative law judge found that this denial, along with Titan's prior notice that it no longer believed claimant was

disabled, was sufficient to constitute a refusal of authorization thus releasing claimant from the requirement that he continue to seek it.[4] As his finding is rational and supported by substantial evidence, we affirm the administrative law judge's finding that employer refused authorization for treatment with Dr. Phillips and his successor, Dr. Adatto. *See Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996); *Maquire v. Todd Pacific Shipyards Corp.*, 25 BRBS 299 (1992). Claimant therefore was released from the obligation to continue to request authorization, and as the administrative law judge found the treatment provided by Drs. Phillips and Adatto was reasonable and necessary for the work injury, employer was properly held liable for it.

Lastly, employer contends that the administrative law judge erred in finding it liable for the treatment provided by Drs. Phillip and Adatto, including the surgery, as these physicians did not provide employer medical reports within 10 days of their first treatment pursuant to Section 7(d)(2) of the Act, 33 U.S.C. §907(d)(2). The administrative law judge remanded the case to the district director to determine whether employer was prejudiced by the failure to file the reports, or whether there was good cause to excuse the failure. *See Toyer v. Bethlehem Steel Corp.*, 28 BRBS 347 (1994)(McGranery, J., dissenting). On remand, the district director found that carrier knew that claimant was treating with Drs. Phillips and Adatto because they paid for some of the treatment. The district director also found that employer knew of the proposed surgery as it was a disputed issue at the informal conference. Thus, the district director found that although Drs. Phillips and Adatto failed to submit the reports of their initial treatment within 10 days of that treatment, the failure is excused because employer did not establish that it was prejudiced by this inaction. Consequently, the district director found that employer is responsible for payment of the treatment of these physicians. The district director's order was not appealed to the Board. Therefore, we grant claimant's motion to strike this argument, and we affirm the administrative law judge's finding that employer is liable for the treatment provided by Drs. Phillip and Adatto. 33 U.S.C. §907(a).

[4] The administrative law judge acknowledged the confusion in claimant's initial choice between Drs. Nelson and Phillips and concluded that based on claimant's continued treatment with Dr. Nelson, he was claimant's initial free choice. *See* 33 U.S.C. §907(b). He also found Dr. Phillips was claimant's initial choice of a specialist as he was an orthopedist and Dr. Nelson was not. However, claimant had also been referred to and treated by Dr. Katz, an orthopedist, prior to seeing Dr. Phillips. Any error in this regard is harmless, in view of the administrative law judge's other findings on this issue.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge