BRB No. 04-0752

WILLIAM J. BURTON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DELTA TERMINAL SERVICES	)	DATE ISSUED: May 16, 2005
	)	
and	)	
	)	
GRAY INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

William S. Vincent, Jr., New Orleans, Louisiana, for claimant.

Collins C. Rossi, Covington, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (2003-LHC-0971) of Administrative Law Judge C. Richard Avery 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 worked for employer as a laborer beginning in October 2000. In mid-December 2000, claimant was on garbage detail and injured his back while tossing garbage into a dumpster. He self-medicated and continued to work. On December 30, 2000, claimant injured his back while pushing "Yellow Grease" in the hold of a barge,

and he was taken to the hospital by the assistant foreman. Decision and Order at 3-4; Tr. at 28-29, 36-40. Claimant selected Dr. Kessler as his orthopedist, and Dr. Kessler treated claimant conservatively. Because claimant's pain continued, Dr. Kessler referred claimant to his partner, Dr. Katz, for further treatment. After additional steroid injections failed, claimant underwent a decompression laminectomy on November 6, 2001. Decision and Order at 4; Tr. at 41-44, 46. On December 17, 2001, Dr. Katz examined claimant, finding the incision well-healed with no spasms and good flexibility. Consequently, he refused claimant additional pain medication, stated there was nothing further he could do for claimant, and determined that claimant's condition had reached maximum medical improvement; however, he also discussed pain management treatment with claimant and stated that claimant could return in four weeks, at which time he would discharge claimant from his care. Emp. Ex. 10. Based on this report, employer ceased paying benefits as of December 26, 2001, and filed a notice of final payment. Emp. Ex. 4. Claimant saw Dr. Katz again on February 13, 2002, at which time he released claimant from his care. Emp. Ex. 11. Because employer ceased payments and because claimant was still under the care of Dr. Davis, his psychiatrist, and Dr. Gupta, his pain management specialist, he filed a claim for continuing compensation and medical benefits on February 21, 2002.[1] Emp. Exs. 1, 6.

The administrative law judge invoked the Section 20(a), 33 U.S.C. §920(a), presumption, determined that employer did not rebut the presumption, and found that claimant established work-related physical and psychiatric injuries. Decision and Order at 16. He found that claimant's physical condition stabilized on January 31, 2002, but that the date of maximum medical improvement is November 8, 2003, when claimant's psychiatrist stated that his mental condition became stabilized. Decision and Order at 17. The administrative law judge found that claimant is totally disabled from all work. Because claimant's condition is work-related and because he found their treatment reasonable and necessary for claimant's work-related injuries, the administrative law judge found that employer is liable for services rendered by Dr. Gupta and Dr. Davis. Decision and Order at 20-21. Nevertheless, because those doctors, as well as Dr. McCain, another pain management physician, did not submit reports to employer within 10 days of first treating claimant, the administrative law judge remanded the case to the district director for consideration of whether the failure of the physicians to file these

[1]Claimant began seeing Dr. Davis for anxiety and depression prior to his employment with employer. According to Dr. Davis, claimant's work injury, pain, and resulting inability to work aggravated claimant's anxiety and depression, and the depression decreased claimant's pain threshold. Cl. Ex. 4; Dep. Davis at 20, 30-34. Dr. Gupta agreed that claimant's pain threshold was lowered by his psychiatric condition. Tr. at 134, 147, 167, 173.

reports should be excused pursuant to Section 7(d)(2), 33 U.S.C. §907(d)(2).[2] Decision and Order at 21-22. Additionally, the administrative law judge accepted claimant's calculation of his average weekly wage and found that claimant did not willfully intend to misrepresent his earnings on the earnings report requested by employer, therefore, his compensation is not subject to forfeiture pursuant to Section 8(j), 33 U.S.C. §908(j). Accordingly, the administrative law judge awarded claimant temporary total disability benefits from December 30, 2000, through November 8, 2003, and permanent total disability benefits thereafter, based on an average weekly wage of $438.80, and medical benefits, subject to the district director's determination on the Section 7(d)(2) issue. Decision and Order at 26. Employer appeals the decision, and claimant responds, urging affirmance.

Post-Hearing Deposition

Employer first argues that the administrative law judge erred in admitting the post-hearing deposition of Dr. Davis into the record. It asserts that the post-hearing deposition gave Dr. Davis and claimant the chance to address the issues of causation and disability – issues not addressed in Dr. Davis' reports. Claimant asserts that employer did not raise this argument before the administrative law judge and, therefore, it is precluded from raising it now. We agree that employer waived its right to make this argument by failing to raise it before the administrative law judge. At the hearing, the administrative law judge stated that there would be depositions of two doctors taken after the hearing and that this would allow the doctors' records to be admitted into the record because employer would have the chance to cross-examine the doctors. *See generally Longo v. Bethlehem Steel Corp.*, 11 BRBS 654 (1979) (discussing admission of *ex parte* medical reports). Employer's counsel did not object to this process. Tr. at 11. Near the close of the hearing, the post-hearing depositions of Drs. McCain and Davis were mentioned several more times with either no response or no objection from employer. Tr. at 177, 197, 208-209. Further, employer was present at the deposition of Dr. Davis and had the opportunity to cross-examine him, and, as claimant states, employer did not raise in its post-hearing brief the issue of the propriety of the deposition of Dr. Davis or the matters he was permitted to discuss. As employer did not raise this issue before the administrative law judge, it may not raise it for the first time before the Board. *Boyd v. Ceres Terminals*, 30 BRBS 218 (1997); *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87 (1989). Therefore, there was no error in admitting the deposition of Dr. Davis into the record.

[2]Dr. McCain treated claimant's back pain with nerve blocks, as did Dr. Rosenfeld, *see infra*. Cl. Exs. 7, 9.

Section 8(j)

Employer also argues that claimant misrepresented his post-injury earnings when he completed the LS-200 earnings form; therefore, claimant should be required to forfeit his compensation for the period for which the earnings were requested. In February 2003, employer sent an LS-200 form to claimant, requesting that he report any earnings from December 21, 2000, through February 5, 2003. Claimant returned the form to employer, signed, but he reported no earnings. Emp. Ex. 7. Later in the year, claimant resubmitted the form with the help of his attorney and cured his alleged mistake.[3] This form, dated September 8, 2003, included earnings of $660 from Dominos Pizza for the period between March 1 and March 13, 2001, and $9.44 from less than one day of work at employer's facility when claimant tried to perform a light-duty job on September 3, 2001. Cl. Ex. 6. The administrative law judge found that, because claimant is disabled from all work and because his attempts to return to work were short-lived and the wages were minimal, the mistake was not willful, was not an attempt to defraud employer, and was not the type of omission Section 8(j) was designed to correct. Decision and Order at 25. Employer contends there is significant evidence impeaching claimant's overall credibility that the administrative law judge did not consider and argues that this evidence establishes claimant's attempt to defraud employer.

Section 8(j) of the Act permits an employer to request a claimant to report his post-injury earnings. Once the request is made, the claimant must complete and return the form within 30 days of his receipt whether or not he has any post-injury earnings. The claimant's benefits are subject to forfeiture if earnings are knowingly and willfully omitted or understated. 33 U.S.C. §908(j);[4] *Hundley v. Newport News Shipbuilding & Dry Dock Co.*,

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[3]Claimant had previously disclosed information of his post-injury earnings in his claim for compensation filed on February 21, 2002. Emp. Ex. 6.

[4]Section 8(j)(1), (2), 33 U.S.C. §908(j) (1)-(2), of the Act provides:

> (1) The employer may inform a disabled employee of his obligation to report to the employer not less than semiannually any earnings from employment or self-employment, on such forms as the Secretary shall specify in regulations.
>
> (2) An employee who--
> (A) fails to report the employee's earnings under paragraph (1) when requested, or
> (B) knowingly and willfully omits or understates any part of such earnings, and who is determined by the deputy commissioner to have violated clause

32 BRBS 254 (1998); *Moore v. Harborside Refrigerated, Inc.*, 28 BRBS 177 (1994) (decision on recon.); 20 C.F.R. §§702.285-702.286.

The administrative law judge has the authority to make credibility determinations, *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961); *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969), and he has the authority to adjudicate the question of whether benefits should be suspended in accordance with Section 8(j). *Moore*, 28 BRBS 177. Any error in the administrative law judge's failure to discuss employer's impeachment evidence is harmless error in this case. The Board recently held in *Briskie v. Weeks Marine, Inc.*, 38 BRBS 61 (2004), pursuant to 20 C.F.R. §702.285(a), that an employer or the Special Fund must be paying the claimant compensation, either voluntarily or by virtue of an award, in order for the claimant to be considered "disabled" under Section 8(j), and for the employer to require the claimant to submit an earnings report pursuant to that section. If the employer or the Special Fund is not paying compensation, the forfeiture provision cannot be applied to a claimant who fails to respond timely or accurately to the wage information request. In this case, employer stopped paying claimant benefits in December 2001 and was not paying claimant compensation when it requested the wage information in February 2003. Therefore, Section 8(j) does not apply to this case, and we affirm the denial of forfeiture, albeit for reasons different than those stated by the administrative law judge. *Briskie*, 38 BRBS at 66.

Notice of Continuing Disability

Employer also contends the administrative law judge erred in awarding medical and disability benefits after Dr. Katz discharged claimant from his care, as it was prejudiced because it was unaware of claimant's continued treatment and alleged continuing disability. In this regard, employer asks that any treatment rendered by Drs. Gupta, McCain, Rosenfeld and Ehrensing be disallowed and any disability determinations rendered by them be disregarded.[5] Claimant argues that the reports of Dr.

> (A) or (B) of this paragraph, forfeits his right to compensation with respect to any period during which the employee was required to file such report.

[5]The administrative law judge did not award any medical benefits for services rendered by Dr. Ehrensing. Decision and Order at 21-22, 26. Dr. Ehrensing treated claimant for his pre-existing diabetes and blood pressure problems and those conditions were not affected by his work injury. Cl. Ex. 2; Tr. at 59. Therefore, employer's challenges pertaining to Dr. Ehrensing's treatment of claimant are moot.

Katz, which employer did receive, were sufficient to put employer on notice of on-going disability and treatment. The administrative law judge rejected employer's argument and found that Dr. Katz's reports provided employer with sufficient notice of claimant's continuing condition and treatment. Decision and Order at 16.

We also reject employer's argument that it did not have sufficient notice of a continuing disability. Claimant filed his claim for compensation only six weeks after Dr. Katz ceased treatment and employer terminated claimant's benefits, and less than 10 days after Dr. Katz formally discharged claimant from his care. Emp. Exs. 6, 10-11. The claim itself was sufficient to put employer on notice that it should investigate claimant's condition. *See generally Meehan Seaway Service, Inc. v. Director, OWCP*, 125 F.3d 1163, 31 BRBS 114(CRT) (8th Cir. 1997), *cert. denied*, 523 U.S. 1020 (1998). Moreover, as the administrative law judge stated, the reports from Dr. Katz referenced claimant's treatment with, at least, Dr. Gupta, also giving employer information regarding continuing treatment. Cl. Exs. 1, 4; Emp. Exs. 9-12; Jt. Ex. 2 at 21, 28-30. Therefore, as there is no other challenge to the administrative law judge's finding that claimant is totally disabled, we affirm the administrative law judge's conclusion that claimant has a continuing work-related disability, as that conclusion is rational and supported by substantial evidence.[6] *See generally Marinelli v. American Stevedoring, Ltd.*, 34 BRBS 112 (2000), *aff'd*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001); Decision and Order at 16; Dep. Davis at 20, 30-34; Tr. at 134, 138-140, 142, 146-147, 151, 167, 173.

Authorization for Treatment

Employer next argues that claimant did not request or obtain authorization for treatment from Drs. Gupta, McCain, and Rosenfeld; consequently, it contends it should not be held liable for the charges incurred for their treatment of claimant.[7] An employer's liability for a claimant's medical treatment is governed by Section 7 of the

[6]To the extent employer's "notice" argument pertains to the question of whether the failure of the physicians to file their reports within 10 days of treating claimant should be excused, that issue has been properly reserved for the district director. 33 U.S.C. §907(d)(4); *Krohn v. Ingalls Shipbuilding, Inc.*, 29 BRBS 72 (1994); *Toyer v. Bethlehem Steel Corp.*, 28 BRBS 347 (1994) (McGranery, J., dissenting).

[7]Although employer disputed liability for the cost of Dr. Rosenfeld's treatment of claimant's back, the administrative law judge made no specific findings or award when discussing claimant's entitlement to medical benefits or reimbursement. Decision and Order at 20-22, 26. We also note that employer does not challenge Dr. Davis' authorization to treat claimant or the finding that treatment rendered by Drs. Davis and Gupta was reasonable and necessary. Emp. Brief at 15-16.

Act. 33 U.S.C. §907. The claimant may be reimbursed for medical expenses paid only if he requested authorization for such treatment, or if he requested authorization and was denied, and the medical treatment he thereafter obtained was found to be reasonable and necessary for his work-related condition. 33 U.S.C. §907(a), (d); *see Slattery Associates, Inc. v. Lloyd*, 725 F.2d 780, 16 BRBS 44(CRT) (D.C. Cir. 1984); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Jackson v. Ingalls Shipbuilding Div., Litton Systems, Inc.*, 15 BRBS 299 (1983) (Miller, J., dissenting); 20 C.F.R. §702.421. Disputes over whether authorization for treatment was requested or refused or whether the treatment was reasonable and necessary are factual matters for the administrative law judge to resolve. *Weikert v. Universal Maritime Service Corp.*, 36 BRBS 38, 40 (2002); *Sanders v. Marine Terminals Corp.*, 31 BRBS 19 (1997); *Toyer v. Bethlehem Steel Corp.*, 28 BRBS 347 (1994) (McGranery, J., dissenting). Despite its having been raised before him, the administrative law judge did not address employer's contention regarding claimant's lack of a request for authorization for certain treatment. Because the administrative law judge did not determine whether claimant requested, or employer refused, authorization of treatment by Drs. Gupta, McCain or Rosenfeld, we vacate the award of medical benefits for treatment rendered by these physicians, and we remand the case to the administrative law judge for further consideration. *See Armfield v. Shell Offshore, Inc.*, 25 BRBS 303 (1993) (Smith, J., dissenting on other grounds); *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87 (1989). On remand, if he finds authorization was requested and refused, the administrative law judge also must address whether the treatment rendered by Drs. McCain and Rosenfeld was reasonable and necessary for claimant's work-related condition. If so, then claimant's entitlement to these medical benefits is subject to whether the district director excuses the failure of the doctors to comply with Section 7(d)(2).

Accordingly, the award of medical benefits is vacated, and the case is remanded for further consideration consistent with this opinion. In all other respects, the Decision and Order 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