U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 23Oct2001

CASE NO.: 2000-LHC-02673

OWCP NO.: 07-148344

In the Matter of:

RICHARD FAYARD,
Claimant

v.

INGALLS SHIPBUILDING, INC.,
Employer

APPEARANCES:

D. JASON EMBRY
For Claimant

PAUL M. FRANKE, JR. ESQ.
For Employer/Carrier

BEFORE: **JAMES W. KERR, JR.**
Administrative Law Judge

DECISION AND ORDER – AWARDING BENEFITS

This proceeding involves a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901, et seq., (the "Act"). The claim is brought by Richard Fayard, Claimant, against his former employer, Ingalls Shipbuilding, Inc. A hearing was held in Biloxi, Mississippi on March 27, 2001, at which time the parties were given the opportunity to offer testimony, documentary evidence, and to make oral argument. The following exhibits were received into evidence:

1) Claimant's Exhibits Nos. 1-16; and

2) Respondent's Exhibits Nos. 1-12.[1]

Upon conclusion of the hearing, the record remained open for the submission of post hearing briefs, which were timely received by both parties. This decision is being rendered after having given full consideration to the entire record.

STIPULATIONS[2]

After an evaluation of the record, the Court finds sufficient evidence to support the following stipulations:

(1) The parties stipulate that Claimant suffered a work-related injury on August 21, 1992 in which he injured his back;
(2) The injury occurred within the course and scope of Claimant's employment; and
(3) A settlement was entered into by and between the parties and approved by the District Director on January 5, 1994. In this settlement, Employer/Respondent agreed to a lump sum payment of $34,000.00 and to be liable for authorized, reasonable and necessary medical treatment causally related to Claimant's back injury. [3]

ISSUES

The unresolved issues in this proceeding are:

1) Whether Claimant's current back complaints and medical treatments are related to his 1992 injury;
2) If so, did Claimant obtain proper authorization for medical expenses; and
3) Attorney's fees

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[1] The following abbreviations will be used in citations to the record: CTX- Court's Exhibit, CX - Claimant's Exhibit, RX - Employer's Exhibit, and TR - Transcript of the Proceedings.

[2]CTX-1

[3]The facts surrounding the injury are listed in the Joint Petition and Compensation Order and incorporated by reference into the present case. See CX-2; CX-3; RX-1.

SUMMARY OF THE EVIDENCE

I. TESTIMONY

Richard Fayard

Richard Fayard, Claimant, testified that since the settlement of his workers' compensation claim in 1994, he has been employed by several companies. He stated that from May, 1994 to June, 1997 he worked for Coastal Cargo as a crane operator. He next went to A & B Electric Co. from November, 1997 to November, 1998 and worked as an electrician. Claimant testified that he also worked for TIMCO and Powerhouse in 1999. He added that he was unemployed from August, 1999 to May, 2000 due to his back pain and subsequent operation in December, 1999. Claimant began working at Wal-Mart in June and July of 2000, and then worked for Autry Greer & Sons. TR. 15-21.

Claimant stated that his back trouble in 1999 began at a different location than his back pain in 1992. He stated that his left leg was hurting, and he initially saw Dr. Cooper for treatment. Claimant testified that he was diagnosed with a pulled muscle. He stated that he had to quit his job at TIMCO soon after, because he could not perform some of the activities on the rigs. Claimant also sought out treatment from a chiropractor, which Respondent approved. When Claimant returned to work, he experienced so much pain that he went to the Singing River Emergency Room. He added that he did not obtain approval for this visit, because he did not know that his leg pain was caused from a pinched nerve or back condition. Claimant was referred to Dr. Cope, who ordered an MRI. He stated that after his MRI request was denied by Respondent/Carrier, he did not seek any prior approval from Respondent. Claimant was referred to Dr. McCloskey in October, 1999 and began seeing a physical therapist. He underwent back surgery in December,1999. TR. 22-30.

Approximately six weeks after his surgery, Claimant was released to light duty with certain restrictions. He stated that he is not currently employed, but is looking for employment. Claimant added that his back still gives him problems, even after the surgery. On cross examination, Claimant admitted that he failed to disclose a complete employment history on his work applications subsequent to the 1994 settlement. He also stated that he signed a paper for TIMCO indicating that he could do all of the requirements of a heavy duty job, such as heavy lifting, bending, and stooping. TR. 35-56.

II. MEDICAL DEPOSITIONS AND RECORDS

DEPOSITIONS

John J. McCloskey, M.D.[4]

Dr. McCloskey initially saw Claimant on October 16, 1999. Claimant complained of left hip pain and posterior thigh pain radiating to the left calf. He noted that Claimant's most recent MRI of the lower back showed a small disc herniation at L5 on the left side. After reviewing Dr. Enger's records of Claimant's past medical history, Dr. McCloskey noted a prior injury, a disc bulge at the L5-S1, to the same area. Dr. McCloskey's initial diagnosis was a symptomatic disc herniation at the L5, left. He opined that Claimant's problem did relate to the 1992 injury at Respondent's facility. He stated that the disc Claimant initially injured had ruptured and become symptomatic. RX-4; RX-6.

Claimant's lumbar myelogram, interpreted on November 18, 1999, was positive for a disc herniation at the L5 on the left. Dr. McCloskey recommended surgery, which was performed on December 2, 1999. He noted that Claimant reached maximum medical improvement in June, 2000 with a 10% permanent physical impairment to the entire body. RX-4; RX-6.

Dr. McCloskey's letter, dated January 6, 2000, indicates that after talking with Dr. Zielenski, it would be difficult to establish causation between Claimant's current difficulties and his old worker's compensation injury. Dr. McCloskey noted that he was aware that Claimant had been diagnosed with spinal stenosis in 1992 by Dr. Enger. However, on March 21, 2001, Dr. McCloskey causally related Claimant's surgery, to the 1992 injury. CX-15; RX-4.

In response to a hypothetical on April 24, 2001, Dr. McCloskey opined that Claimant's congenital problems would not cause his pain, only a herniated/bulging disc would. He added that after considering Claimant's complete work history, it was likely that Claimant suffered one or more new injuries since 1992. He added that this additional injury was to the same disc Claimant injured in 1992. RX-10; RX-11.

Kevin S. Cooper, M.D.[5]

Dr. Kevin Cooper, general practitioner, testified that he examined and treated Claimant on October 17, 1994 and October 16, 1998. Claimant's first visit was for treatment and removal of a foreign object that got in his left eye at work. Dr. Cooper testified that he filled out the workers' compensation forms, and Claimant was returned to regular duty the following day. On October 16, 1998, Claimant saw Dr. Cooper complaining of a strain in his left hamstring while working at TIMCO. Dr. Cooper diagnosed him

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[4]Dr. McCloskey's records are reproduced as RX-4. These medical records have been considered by this Court and will be cited concurrently with his deposition testimony.

[5]Dr. Cooper's records are reproduced as RX-5. These medical records have been considered by this Court and will be cited to the extent that they add to his deposition testimony.

with a biceps femoris strain. He opined that a strained muscle could last from weeks to months depending on the severity of the strain. Dr. Cooper opined that this strain probably occurred within several days of Claimant's office visit. He stated that he did not know whether or not Claimant filed for worker's compensation for the injury. Dr. Cooper added that Claimant gave no indication that he could have been injured at any other employment. RX-5; RX-7.

RECORDS

Medical Records of Daniel J. Enger, M.D.

Claimant was initially seen by Dr. Enger's office on September 10, 1992. At that time, Claimant reported a severe attack of lower back pain while lifting a piece of pipe at work in August, 1992. Dr. Enger noted that Claimant's pain was located halfway up his back and in the anterior aspect of the right thigh. His clinical impression, on that date, was an acute lumbar strain and he intended to rule out an early intervertebral disc. Claimant was kept on light to regular duty, concurrent with a back exercise program, through February 12, 1993. Dr. Enger noted that an MRI and x-ray of the lumbar spine showed a congenital narrowing of the spinal canal with a small central protrusion at the L5-S1 level. Dr. Enger opined that this condition would make Claimant more prone to a small disc protrusion. He also noted that Claimant had a family history of back problems. Dr. Enger added that while Claimant did not currently have a disc problem requiring surgery, he would be at an increased risk for problems in the future. He assigned permanent restrictions for Claimant. Dr. Enger noted that as of June 11, 1993, Claimant was asymptomatic, and opined that this was because he was not working as a pipefitter. The submitted records indicate that Claimant was last seen by Dr. Enger on August 26, 1993. CX-6.

Medical Records of Steven B. Fineburg, M.D.

Claimant was seen by Dr. Fineburg on several occasions for leg pain in 1999. A review on the September 15, 1999 MRI was normal with no evidence of spinal stenosis. However, an addendum was attached correcting the impression to be an abnormal MRI of the lumbar spine with evidence of an L5-S1 diffuse annular bulge and a small focal protrusion within the lateral left recess. In November, 1999 an MRI scan indicated central and left-sided disc bulging at L5, similar to the findings in the September 15, 1999 MRI scan. Claimant was referred to Dr. McCloskey on September 16, 1999. CX-7.

Medical Records of Mississippi Coast Orthopaedic Clinic (Chris E. Wiggins, M.D. and John W. Cope, M.D.)

Claimant was later seen for pain in the left hip and leg in November, 1998. Dr. Cope recommended an MRI, which was not approved by the compensation carrier. His assessment on followup

in March, 1999 was that Claimant had lumbar disc syndrome with acute spina bifida occulta at L-5. In a letter dated May 26, 1999, Dr. John Cope opined that Claimant's current problems were not due to the industrial injury of August 21, 1992. CX-8.

Medical Records of Singing River Hospital

Claimant was seen at the Singing River Hospital for recurrent back pain on September 23, 1996. He reported that the original injury occurred at Respondent's facility. Claimant complained of pain in the lumbar sacral area to the left side, with leg pain and pain in the right upper lumbar and lower thoracic area. Claimant reported that this pain occurred after he was lifting some boxes and helping his girlfriend move. He also stated that since the accident at Respondent's in 1992, he has experienced recurrent back pain. On September 25, 1996, Dr. Weatherall opined that Claimant had a low back exacerbation that had currently resolved itself. Claimant was seen in October,1998 and released on October 28, 1998 to regular work activities. An x-ray indicated no acute trauma. CX-10.

On October 27, 1999, the hospital physical therapy department of the hospital noted that Claimant appeared to have a very symptomatic lumbar disc problem. In November, 1999 an MRI was taken which showed evidence of an L5-S1 diffuse annular bulge with a small focal protrusion within the far lateral left recess. Claimant was treated with traction therapy. A laminectomy was performed on December 2, 1999, and an obvious disc herniation was found and removed at the L-5 on the left. CX-10.

Records dated February 2000 note an improvement in Claimant's condition with some pain still present. He was treated with stimulation to his left medial and lateral hamstring region. CX-10.

III. <u>OTHER EVIDENCE</u>

Employment Records for TIMCO

Respondent submitted copies of Claimant's application for employment at TIMCO, dated October 13, 1998. Claimant applied for a heavy industrial position and checked that he could engage in heavy manual activities. He noted no physical restrictions on this application. Additionally, on his employment history, Claimant only listed A&B Electric Co. and Coastal Cargo as his past employers from July, 1993 through October, 1998. RX-12.

<u>FINDINGS OF FACT AND CONCLUSIONS OF LAW</u>

The following findings of fact and conclusions of law are based upon the Court's observations of the credibility of the witnesses who testified at the hearing and upon an analysis of the entire record,

applicable regulations, statutes, case law, and arguments of the parties. As the trier of fact, this Court may accept or reject all or any part of the evidence, including that of expert medical witnesses, and rely on its own judgment to resolve factual disputes and conflicts in the evidence. See Todd Shipyards v. Donovan, 300 F.2d 741 (5th Cir. 1962). In evaluating the evidence and reaching a decision, this Court applied the principle, enunciated in Director, OWCP v. Maher Terminals, Inc., 115 S. Ct. 2251 (1994), that the burden of persuasion is with the proponent of the rule. The "true doubt" rule, which resolves conflicts in favor of the claimant when the evidence is balanced, will not be applied, because it violates section 556(d) of the Administrative Procedures Act. See Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251, 129 L.Ed. 221 (1994).

I. FACT OF INJURY AND CAUSATION

To establish a prima facie claim for compensation, a claimant does not need to affirmatively establish a connection between the work and the harm. Section 20(a) of the Act, 33 U.S.C. §920(a), provides the claimant with a presumption that his injury was causally related to his employment if he establishes two things. First, the claimant must prove that he suffered a physical injury or harm. Second, he must show that working conditions existed, or a work accident occurred, which could have caused, aggravated, or accelerated the injury. See Gencarelle v. General Dynamics Corp., 22 BRBS 170 (1989).

1. CLAIMANT'S SHOWING OF A HARM

The first prong of a claimant's prima facie case requires him to establish the existence of a physical harm or injury. The Act defines an injury as the following:

> accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.
> 33 U.S.C. § 902 (2).

An accidental injury occurs when something unexpectedly goes wrong within the human frame. See Wheatley v. Adler, 407 F.2d 307 (D.C. Cir. 1968). Additionally, an injury need not involve an unusual strain or stress, and it makes no difference that the injury might have occurred wherever the employee might have been. See Wheatley; Glens Falls Indemnity Co. v. Henderson, 212 F.2d 617 (5th Cir. 1954). The claimant's uncontradicted credible testimony may alone constitute sufficient proof of physical injury. See

Hampton v. Bethlehem Steel Corp., 24 BRBS 141 (1990); Golden v. Eller & Co., 8 BRBS 846 (1978), aff'd, 620 F.2d 71 (5th Cir. 1980). The Court has the discretion to determine a witness' credibility, and may accept a claimant's testimony as credible, despite inconsistencies, if the record provides substantial evidence of the claimant's injury. Kubin v. Pro-Football, Inc., 29 BRBS 117, 120 (1995); See Plaquemines Equipment & Machine Co. v. Neuman, 460 F.2d 1241, 1243 (5th Cir. 1972).

In this case, Claimant contends that he suffers from recurrent back problems stemming from his injury in 1992 at Respondent's facility. *See* CTX-1. The initial injury to Claimant's back is undisputed. *See* CTX-1; CX-2; RX-1. Claimant's treating physician in 1992, opined that Claimant suffered from a small central protrusion of the disc at the L5-S1 level. Claimant, asserts that since the diagnosis in 1992, he has suffered from minor back pain that worsened in 1998 and 1999, necessitating surgery. While Claimant has been inconsistent in reporting his employment history and physical abilities to his employers, this Court finds that his testimony as to his back pain and injuries are general straight-forward and credible. Additionally, his testimony is supported by the medical evidence in the record. An MRI taken in November, 1999 showed clear evidence of a disc herniation at the L5 level, the same disc that was initially injured in 1992. *See* CX-7. Subsequently Dr. McCloskey, Claimant's current treating physician, removed an obvious disc herniation at the L5-S1 level . Therefore, this Court finds that Claimant's testimony of current back problems is corroborated by the medical evidence in the record. As a result, Claimant has presented sufficient evidence to meet the first prong of his prima facie case.

2. CLAIMANT'S SHOWING OF A WORK ACCIDENT

In order to invoke the §20(a) presumption, Claimant must also show the occurrence of an accident or the existence of working conditions which could have caused the harm. The Section 20(a) presumption does not assist the Claimant in establishing the existence of a work-related accident. See Mock v. Newport News Shipbuilding & Dry Dock Co., 14 BRBS 275 (1981). Therefore, a claimant has the burden of establishing the existence of such an accident by a preponderance of the evidence. The Court must weigh all the record evidence, including that supporting claimant's testimony and that contradicting it, in order to determine whether he has met his burden in establishing a work accident.

It is undisputed that Claimant injured his back on August 21, 1992, when he was attempting to lift a pipe valve at work. *See* CTX-1. This injury aggravated his congenital spinal stenosis, resulting in a disc bulge at the L5-S1 level. *See* CX-6. Dr. Enger opined that this disc bulge did not require surgery at the time, but would cause Claimant some future problems. *See* CX-6. It is evident to this Court from Claimant's testimony and the medical evidence that the disc bulge found in 1992 did cause Claimant recurrent pain. Claimant self-reported recurrent back pain in the L5-S1 area, the same location at the protruding disc, to Singing River Hospital in 1996. While the self-reported complaints are highly subjective, this Court finds that the medical evidence supports his claim. Dr. McCloskey opined that Claimant's

herniated disc became symptomatic over a period of time. *See* RX-4; RX-11. Respondent asserts that the increase in symptoms was due to Claimant helping his girlfriend lift boxes during a move. However, the record indicates that Claimant worked several jobs in the intervening period between his accident and subsequent surgery which required lifting. *See* TR. 22-30; RX-12. While Claimant did mark on his employment form that he could do heavy labor, he testified that he quit working for his employers when the work caused him pain. *See* TR. 22-30. Even though, there is no evidence of hospitalization or treatment for severe back problems during those periods following the 1992 accident, this Court finds that factor indicative of Claimant's reports that his back bothered him in phases.

After Claimant's surgery, Dr. McCloskey noted that it might be difficult to relate the ruptured disc to the 1992 injury. *See* RX-4. In response to a hypothetical regarding Claimant's condition, Dr. McCloskey opined that a series of events, working outside his restrictions and lifting boxes, could have aggravated and contributed to Claimant's injury. *See* RX-11. However, he did not rule out the 1992 injury as the cause of Claimant's disc rupture. In fact, during his deposition, Dr. McCloskey maintained that Claimant's accident in 1992 caused a protruding disc, resulting in a permanent impairment. *See* RX-6. He opined that Claimant's disc rupture would probably not have occurred if not for the 1992 injury. *See* RX-6. Since Dr. McCloskey was Claimant's treating physician for his ruptured disc, the injury at issue in this case, this Court will heavily weigh his opinion in determining causation.

The objective medical evidence in this case, the MRI scans and x-rays, also shows that Claimant had a pre-existing condition, spinal stenosis, which was aggravated by an accident at Respondent's facility. *See* CX-6. This resulted in a protruding disc at the L5-S1 level, which made Claimant susceptible to injuries in this area. *See* CX-6. After several years, this protruding disc finally ruptured, resulting in leg and lower back pain, a factor which is supported by the MRI scans and office visits. *See* CX-7; CX-8; CX-10. Therefore, this Court finds that Claimant has provided sufficient evidence to invoke the Section 20(a) presumption as to his back injury.

3. REBUTTAL EVIDENCE

Once Claimant has invoked the presumption, the burden shifts to the employer to rebut the presumption with substantial countervailing evidence. See James v. Pate Stevedoring Co., 22 BRBS 271 (1989). The employer must present specific and comprehensive medical evidence proving the absence of or severing the connection between such harm and employment or working conditions. Ranks v. Bath Iron Works Corp., 22 BRBS 301, 305 (1989); See James v. Pate Stevedoring Co., 22 BRBS 271 (1989). If the presumption is rebutted, it no longer controls, and the record as a whole must be evaluated to determine the issue of causation. See Volpe v. Northeast Marine Terminals, 671 F.2d 697 (2d Cir. 1982); See Del Vecchio v. Bowers, 296 U.S. 280 (1935).

Respondent's primary allegations are that Claimant ruptured the disc in his back either working at another facility or when lifting boxes and helping his girlfriend move. To that effect, Respondent submitted several medical records and doctor's opinions as to causation. After examining the evidence, this Court finds that Respondent's evidence is insufficient to rebut causation. Claimant was initially admitted to the Singing River Emergency Room in 1996, reporting back pain radiating into his left leg. He added that this pain occurred after he was helping his girlfriend move boxes. *See* CX-10. However, Claimant also reported that he had recurrent back pain doing certain activities ever since his work-related accident in 1992. *See* CX-10. Claimant's report of an isolated incident of lifting boxes is not sufficient, in itself, to sever a causal connection between the initial injury to the disc and the subsequent rupture of the disc. Additionally, Dr. Weatherall opined that Claimant suffered only a low back exacerbation from that incident, which had resolved itself. *See* CX-10. This Court finds Dr. Weatherall's opinion plausible in light of Claimant's reports of recurrent back pain.

The x-rays and MRI scans from Singer Hospital are also insufficient to sever a causal connection. The fact that the x-ray taken in 1996 did not reveal a herniated disc at that time does not sever a causal connection between the protruding disc and the resultant herniation, because the protruding disc could have worsened in phases. Another significant factor is that the MRI scan, taken in 1999, was initially interpreted as normal but re-interpreted to show signs of a herniated disc. Therefore, Respondent has not presented clear, objective medical evidence that some intervening event, other than the protruding disc, caused Claimant's disc to rupture.

During 1998 and 1999, Claimant was seen for leg pain by several physicians. Dr. Cooper treated Claimant in 1998 for what he diagnosed as a pulled muscle in Claimant's left leg. *See* RX-5; RX-7This Court finds his opinion to be insufficient to sever causation on two grounds. First, Dr. Cooper testified that Claimant reported that this pulled muscle occurred while he was working for TIMCO. *See* RX-5. Second, Dr. Cooper did not relate the pulled muscle or the employment at TIMCO as causing a rupture to Claimant's protruding disc. Claimant was also seen by Drs. Wiggins and Cope at the Mississippi Orthopaedic Clinic in 1998 and 1999 for pain in the left hip and leg. *See* CX-8. Dr. Cope diagnosed Claimant with lumbar disc syndrome and acute spina bifida occulta at L-5, the same location of the 1992 injury. *See* CX-8. While he opined that Claimant's current condition was not due to the 1992 incident, he did not give any basis for his opinion. *See* CX-8. Since Claimant's request for an MRI through the clinic was not approved, there is no objective medical evidence in his records to support his conclusions. Therefore, this Court will not consider his opinion sufficient to sever causation.

After an examination of the record, this Court finds that Respondent has not presented substantial countervailing evidence to rebut Claimant's section 20(a) presumption. Additionally, this Court finds that Claimant's 1992 accident at work, resulting in a protruding disc, could in fact have caused, contributed, or aggravated Claimant's back to the point that the disc ruptured. While this Court does note that there

could have been other contributing factors, such as work or heavy lifting, that aggravated Claimant's back, the evidence presented is insufficient to sever a causal connection between the protruding disc condition and its subsequent rupture. Therefore, pursuant to the terms of the settlement, Claimant is entitled to properly authorized, reasonable and necessary medical benefits associated with his injury under the LHWCA.

II. REASONABLE AND NECESSARY MEDICAL EXPENSES

Section 7(a) of the Act provides that:

> (a) The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process or recovery may require. 33 U.S.C. § 907(a).

In order for a medical expense to be assessed against the employer, the expense must be both reasonable and necessary. Parnell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must be appropriate for the injury. 20 C.F.R. § 702.402. A claimant has established a prima facie case for compensable medical treatment where a qualified physician indicates treatment is necessary for a work related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-258 (1984). The claimant must establish that the medical expenses are related to the compensable injury. See Pardee v. Army & Air Force Exch. Serv., 13 BRBS 1130 (1981); See Suppa v. Lehigh Valley R.R. Co., 13 BRBS 374 (1981). The employer is liable for all medical expenses which are the natural and unavoidable result of the work injury, and not due to an intervening cause. See Atlantic Marine v. Bruce, 661 F.2d 898, 14 BRBS 63 (5th cir. 1981), aff'g 12 BRBS 65 (1980).

This Court has previously determined that Claimant's 1992 work-related injury resulted in a protruding disc that eventually ruptured. Respondent has presented insufficient evidence of any intervening causes that would sever a connection between the 1992 injury and Claimant's current condition. Therefore, he is entitled to all properly authorized and reasonable medical benefits associated with his back condition.

Section 7(d)(2) of the Act provides in pertinent part that:

> (2) No claim for medical or surgical treatment shall be valid and enforceable against such employer unless, within ten days following the first treatment, the physician giving such treatment furnishes to the employer and the deputy commissioner a report of such injury

> or treatment, on a form prescribed by the Secretary. The Secretary may excuse the failure to furnish such report within the ten-day period whenever he finds it to be in the interest of justice to do so. 33 U.S.C. § 97(d)(2).

Therefore, an employer is not ordinarily responsible for the payment of benefits if the injured employee fails to obtain the required authorization. Slattery Assoc. v. Lloyd, 725 F.2d 780, 787, 16 BRBS 44, 53 (CRT)(D.C. Cir. 1984). However, once an employer has refused to provide treatment or to satisfy a claimant's request for treatment, the claimant is released from the obligation of continuing to seek the employer's approval. See Pirozzi v. Todd Shipyards Corp., 21 BRBS 294 (1988). The claimant then need only to establish that the treatment subsequently procured on his own initiative was necessary for treatment of the injury. See Rieche v. Tracor Marine, 16 BRBS 272 (1984).

In the instant case, Claimant was required to obtain authorization pursuant to the terms of the settlement agreement, consistent with Section 7 of the Act. *See* CTX-1; CX-2; RX-1. Claimant testified that after experiencing recurrent leg and lower back pain, he attempted to obtain authorization for an MRI through Dr. Cope in November, 1998. *See* TR. 22-30. Although a consultation with Dr. Cope was approved, the subsequent MRI scan was denied. *See* CX-8; TR. 22-30. Therefore, after the denial of the MRI, Claimant was released from the obligation of seeking prior authorization from Respondent/Carrier. This Court also finds that Claimant has established that the subsequent treatments and diagnostic testing were necessary in order to improve his back condition and lessen his pain. As a result, Claimant is entitled to reimbursement and/or payment for reasonable and necessary medical benefits involving his back condition after the denial of the MRI scan in November, 1998.

Accordingly,

ORDER

It is hereby **ORDERED, ADJUDGED AND DECREED** that:

(1) Employer/Carrier shall pay or reimburse Claimant for reasonable and necessary medical expenses with interest, in accordance with Section 1961, which resulted from the aggravation of his pre-existing back injury in 1992. See 33 U.S.C. §907;

(2) Claimant was released from his obligation to seek prior authorization for medical expenses relating to the MRI scan following Respondent's denial in November, 1998. He is entitled to reimbursement for reasonable and necessary expenses relating to that procedure; and

(3) Claimant's counsel shall have twenty days from receipt of this Order in which to file a fully supported attorney fee petition and simultaneously to serve a copy on opposing counsel. Thereafter, Employer shall have twenty (20) days from receipt of the fee petition in which to file a response.

Entered this 23rd day of October, 2001, at Metairie, Louisiana.

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JAMES W. KERR, JR.

Administrative Law Judge

JWK/sls