BRB No. 05-0586

HOWARD SINGER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
KINDER MORGAN, INCORPORATED	)	DATE ISSUED: 04/06/2006
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order and Order on Motions for Reconsideration of Gerald M. Etchingham, Administrative Law Judge, United States Department of Labor.

David Utley, Carson, California, for claimant.

Lisa M. Conner (Aleccia, Conner & Socha), Long Beach, California, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order and Order on Motions for Reconsideration (2004-LHC-0212) of Administrative Law Judge Gerald M. Etchingham 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 sustained an injury to his left knee, which he alleged is due either directly to his work for employer which ended on or about September 7, 2001, or alternatively, to his favoring his left knee following surgery for a work-related injury to his right knee on September 11, 2001; this surgery involved a right total knee arthroplasty performed by Dr. Hajj. Claimant testified that his left knee began bothering him in 1999, and thereafter he received treatment for both knees. Drs. Kang, Johnson and Hajj noted severe osteoarthritis of his left knee. On March 18, 2003, Dr. Hajj recommended that claimant undergo a left knee arthroplasty. Claimant notified employer of his alleged work-related left knee injury on June 17, 2003, and he filed a claim with the Department of Labor for that injury on July 3, 2003.[1] Employer controverted the claim, arguing that claimant's notice of injury was untimely filed pursuant to Section 12(a) of the Act, 33 U.S.C. §912(a).

In his decision, the administrative law judge found that claimant's claim for disability compensation is time barred by Section 12, as claimant did not provide timely written notice to employer of his left knee injury and his failure to do so was not excused under Section 12(d), 33 U.S.C. §912(d). In addressing causation on the medical benefits claim, the administrative law judge determined that claimant was entitled to the Section 20(a) presumption that his left knee condition is work-related, that employer established rebuttal thereof, and that substantial evidence establishes that claimant's "left knee condition was aggravated by his employment activities with employer" in September 2001, Decision and Order at 23, but not "by his altered gait and use of a walker and cane following the September 11, 2001, surgery" for the right knee condition. Decision and Order at 25. The administrative law judge thus found employer liable for all reasonable and necessary medical expenses stemming from claimant's work-related left knee injury.

Employer and claimant each sought reconsideration before the administrative law judge. In his subsequent order, the administrative law judge modified his decision to reflect: that employer is not liable for medical benefits prior to June 17, 2003, the date upon which it first received written notice from claimant of his work-related left knee condition; that Dr. Hajj's December 27, 2001, report and deposition testimony do not show that Dr. Hajj opined any earlier than March 2003 that claimant's work with employer caused or aggravated his left knee condition; and that claimant stipulated to employer's proposed date of August 18, 2003, as the beginning date of temporary total disability due to his left knee condition.

[1] Dr. Kelly subsequently performed a left knee arthroscopy with partial meniscectomy and chondroplasty on January 28, 2004.

On appeal, claimant challenges the administrative law judge's denial of his claim for disability benefits related to his left knee injury. Employer responds, urging affirmance.

Claimant contends that the administrative law judge erred in finding that he did not give timely notice of his left knee injury under Section 12. Claimant first asserts that it was unnecessary for him to file a separate notice of injury for his left knee condition since it is undisputed that employer received timely notice of claimant's right knee injury. Claimant further asserts, with regard to his claim based on his employment directly causing his left knee injury, that the administrative law judge erred in finding that his failure to give timely notice was not excused pursuant to Section 12(d).

The administrative law judge found that claimant's left knee condition is not the result of his right knee injury. This finding, which claimant does not contest on appeal, is supported by substantial evidence in the form of Dr. London's opinion that claimant's left knee symptoms were not aggravated or caused by his overcompensating for his weaker, right knee following the September 11, 2001, surgery. As the finding that claimant's left knee injury did not occur as a direct result of his prior work-related right knee injury must therefore be affirmed, we reject claimant's contention that he was not required to file a new timely notice of injury.[2]

Section 12(a) of the Act requires that claimant must, in a traumatic injury case, give employer written notice of his injury within 30 days of the injury or of the date claimant is aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the injury and his employment.[3] *Todd Shipyards Corp. v. Allan*, 666 F.2d 399, 14 BRBS 427 (9th Cir.),

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[2] We note that the administrative law judge erred in stating that *Thompson v. Lockheed Shipbuilding & Constr. Co.*, 21 BRBS 94 (1988), required claimant to file a second notice of injury in this case. In fact, under *Thompson*, a claimant need not file a separate notice of injury for each additional medical problem which develops as a sequela of a timely-noticed work injury. Thus, claimant's notice of injury for his left knee injury would be timely under Section 12(a) if the record established that claimant's left knee condition was caused or aggravated by his right knee injury. *Thompson*, 21 BRBS 94. The administrative law judge's error, however, is harmless based on his determination that claimant's left knee condition was not caused or aggravated by his work-related right knee surgery.

[3] Section 12(a), 33 U.S.C. §912(a), states:

> Notice of an injury or death in respect of which compensation is payable under this Act shall be given within thirty days after the date of such injury

cert. denied, 459 U.S. 1034 (1982); *Bivens v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 233 (1990). In the absence of substantial evidence to the contrary, it is presumed, pursuant to Section 20(b) of the Act, 33 U.S.C. §920(b), that employer has been given sufficient notice of the injury pursuant to Section 12. *See Lucas v. Louisiana Ins. Guaranty Ass'n*, 28 BRBS 1 (1994). "Awareness" for purposes of Section 12 in a traumatic injury case occurs when claimant is aware, or should have been aware, of the relationship between the injury, the employment, and the disability, and not necessarily on the date of the accident, or in this repetitive trauma case, the date of the last alleged trauma. *See Ceres Gulf, Inc. v. Director, OWCP [Fagan]*, 111 F.3d 17, 31 BRBS 21(CRT) (5th Cir. 1997); *Newport News Shipbuilding & Dry Dock Co. v. Parker*, 935 F.2d 20, 24 BRBS 98(CRT) (4th Cir. 1991); *J.M. Martinac Shipbuilding v. Director, OWCP [Grage]*, 900 F.2d 180, 23 BRBS 127(CRT) (9th Cir. 1990); *Marathon Oil Co. v. Lunsford*, 733 F.2d 1139, 16 BRBS 100(CRT) (5th Cir. 1984); *see also Bath Iron Works Corp. v. Galen*, 605 F.2d 583, 10 BRBS 863 (1st Cir. 1979).

The administrative law judge found, based on claimant's claim that his left knee condition was, like his right knee condition, directly related to his work for employer, that claimant's written notice to employer on June 17, 2003, was untimely, since the evidence establishes that claimant, in the exercise of due diligence, should have been aware of the relationship between his left knee injury and his employment by June 4, 2002. We affirm the finding regarding claimant's date of awareness as it is supported by substantial evidence and is not challenged on appeal. EX 10. Claimant's formal notice, therefore, was not timely under Section 12(a).

Claimant, however, argues that the administrative law judge erred in finding that his alleged lack of written notice under Section 12(a) was not excused by Section 12(d). Specifically, claimant maintains that employer had actual knowledge of the work-related nature of claimant's left knee injury by virtue of Dr. Hajj's December 27, 2001, report wherein he opined that claimant's job "has aggravated and accelerated his symptomatology" with regard to his left knee. 33 U.S.C. §912(d)(1). Claimant further argues that the administrative law judge misapplied the prejudice standard set out in *Kashuba v. Legion Ins. Co.*, 139 F.3d 1273, 32 BRBS 62(CRT) (9th Cir. 1998), *cert.*

> or death, or thirty days after the employee or beneficiary is aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of a relationship between the injury or death and the employment, except that in the case of an occupational disease which does not immediately result in a disability or death, such notice shall be given within one year after the employee or claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability. . . .

denied, 525 U.S. 1102 (1999), in finding that his lack of timely notice was not excused under Section 12(d)(2). Claimant maintains that employer did not meet its burden of establishing prejudice, particularly since no evidence was offered or cited by employer in support of its prejudice claim. In contrast, claimant contends that Dr. London's evaluation, on October 3, 2002, wherein he opined that claimant's left knee symptoms and complaints were not work-related, proves that employer was, in fact, able to effectively investigate the injury to determine its nature and extent.

Section 12(d) of the Act, 33 U.S.C. §912(d), provides in pertinent part:

> Failure to give such notice required by Section 12(a) shall not bar any claim under this chapter (1) if the employer . . . or the carrier had knowledge of the injury or death, (2) the deputy commissioner determines that the employer or carrier has not been prejudiced by failure to give such notice, or (3) if the deputy commissioner excuses such failure [for one of the enumerated reasons]. . . .

Because Section 12(d) is written in the disjunctive, claimant's failure to file a notice of injury will not bar a claim if any of three bases is met: employer had actual knowledge of the injury, employer was not prejudiced by the failure to give formal notice, or the district director excused the failure to file. *See Boyd v. Ceres Terminals*, 30 BRBS 218 (1997); *Sheek v. General Dynamics Corp.*, 18 BRBS 151 (1986), *modifying on recon.* 18 BRBS 1 (1985). Pursuant to Section 20(b), employer bears the burden of producing substantial evidence that none of these bases applies. The implementing regulation states that "actual knowledge" of the injury is deemed to exist if claimant's immediate supervisor is aware of the injury. 20 C.F.R. §702.216. This imputed knowledge under Section 12(d)(1) requires knowledge of the fact of injury, as well as knowledge of its work-relatedness. *Addison v. Ryan-Walsh Stevedoring Co.*, 22 BRBS 32 (1989). Moreover, prejudice under Section 12(d)(2) may be established where employer provides substantial evidence that due to claimant's failure to provide timely written notice, it was unable to effectively investigate the injury to determine the nature and extent of the illness or to provide medical services. A conclusory allegation of prejudice or of an inability to investigate the claim when it is fresh is insufficient to meet employer's burden of proof. *See Jones Stevedoring Co. v. Director, OWCP [Taylor]*, 133 F.3d 683, 31 BRBS 178(CRT) (9th Cir. 1997); *ITO Corp. v. Director, OWCP*, 883 F.2d 422, 22 BRBS 126(CRT) (5th Cir. 1989); *Bustillo v. Southwest Marine, Inc.*, 33 BRBS 15 (1999).

The administrative law judge initially concluded that, absent evidence that employer knew anything that would suggest the left knee injury was work-related, the claimant's late formal notice was not excused on this basis. In this regard, the administrative law judge found that either Dr. Hajj's December 27, 2001, report or Dr. Johnson's June 4, 2002, report, when considered together with evidence of employer's

knowledge in 2001 that claimant alleged his arthritic right knee was injured and/or aggravated by his work activities, and that claimant had suffered a similar arthritic condition in his left knee, could have "possibly led a reasonable person to conclude that investigation into the left knee was warranted," Decision and Order at 13, but the record does not indicate if and when employer received those reports. On reconsideration, the administrative law judge acknowledged that employer received Dr. Hajj's December 27, 2001, report on January 29, 2002. Nevertheless, he concluded that Dr. Hajj's causation statement therein did not support a finding of employer's knowledge as to the work-related nature of claimant's left knee injury for purposes of Section 12(d). The administrative law judge observed that "a complete reading of Dr. Hajj's December 27, 2001, report indicates that Dr. Hajj was in fact concentrating his evaluation on claimant's right knee," Reconsideration Order at 2, since Dr. Hajj primarily made notes of claimant's right knee pain and physically examined only that particular knee. The administrative law judge further found that Dr. Hajj clarified his statement at his September 13, 2003, deposition when he explained that he was referring to claimant's right knee when he opined about causation.[4] Thus, the administrative law judge, on reconsideration, changed his prior statement that Dr. Hajj's December 27, 2001, report "could have possibly led a reasonable person to conclude that investigation into the left knee was warranted." Decision and Order at 13. Rather, he concluded, after a complete review of Dr. Hajj's reports and testimony, that Dr. Hajj first opined on March 18, 2003, that claimant's left knee injury was aggravated, worsened or injured by his right knee injury, and that he did not specifically opine that claimant's left knee was related to his work for employer until asked at his September 11, 2003, deposition.

The record supports the administrative law judge's findings as to when Dr. Hajj rendered an opinion regarding the work-related nature of claimant's left knee condition. EX 19. We therefore reject claimant's assertion that Dr. Hajj's December 27, 2001, report is sufficient to establish that employer had the requisite knowledge for purposes of Section 12(d)(1) to excuse his late filing of written notice. Moreover, as Dr. Hajj's collective reports and opinions establish that he did not provide an opinion on causation with regard to claimant's left knee condition until March 18, 2003, or September 11, 2003, and as the record is otherwise devoid of evidence establishing an earlier date for

[4] At his deposition, Dr. Hajj stated that he did not discuss the work-relatedness of claimant's left knee condition at the time of his December 27, 2001, report, Dep. at 10, nor had any recollection of discussing the work-related nature of claimant's left knee injury with claimant at that time. HT at 12. Commenting on his statement, in the December 27, 2001, report, that claimant's job aggravated and accelerated his symptomatology, Dr. Hajj testified that "at the time we were mainly talking about the right knee; but as I say, it applies to both knees." EX 19, Dep. at 14. Nevertheless, he added, "the report was mainly addressing the right knee." *Id.* at 16.

employer's knowledge, we affirm the administrative law judge's conclusion that employer did not have actual knowledge under Section 12(d)(1) so as to excuse claimant's late notice of injury. *Addison*, 22 BRBS 32 (employer's knowledge of a work-related accident is not sufficient to charge it with actual knowledge of a subsequent injury).

In discussing Section 12(d)(2), the administrative law judge initially found that employer "was not prejudiced by their not having time to get a second opinion [regarding claimant's need for left knee surgery] prior to surgery," *i.e.*, employer had notice before the 2004 surgery on claimant's left knee, and that "there are no credibility problems concerning whether the activities that are purported to have caused claimant's left knee injury actually occurred." Decision and Order at 15. The administrative law judge thus found that the instant case is distinguished from *Kashuba*, 139 F.3d 1273, 32 BRBS 62(CRT), since employer therein did not receive notice of injury until after claimant underwent surgery for his alleged work-related condition. In contrast, in this case, employer obtained the opinion of Dr. London, who first examined claimant in 2002 for his right knee injury and then saw him again in October 2003 and rendered an opinion regarding his left knee. The administrative law judge nonetheless found that claimant's lack of timely written notice resulted in prejudice to employer since many of claimant's activities after his right knee surgery could have been intervening causes of his left knee condition. Specifically, the administrative law judge found that employer did not have the ability to timely investigate and monitor the effect that claimant's non-work-related activities of line dancing, Kenpo karate, and riding motorcycles, may have had in aggravating his left knee condition, particularly given that these activities might "likely amount to intervening causes for claimant's left knee problem."[5] Decision and Order at 16.

We cannot affirm the administrative law judge's finding that employer was prejudiced by the untimely written notice of injury, as he did not cite any specific evidence supporting the conclusion that employer was actually prejudiced, and the record contains evidence that was not discussed which indicates employer was able to effectively investigate the claim. Employer was able to have claimant examined by Dr. London and thus to submit probative evidence on his medical condition prior to his left knee surgery. With regard to claimant's non-work activities, employer submitted evidence into the record regarding the specific nature of claimant's post-surgery karate activities in the form of a videotape and testimony from claimant's instructor, and Dr.

[5] The administrative law judge nonetheless concluded, in addressing causation under Section 20(a) with regard to the claim for medical benefits, that claimant's physical activities of line dancing, Kenpo karate and/or riding motorcycles were not intervening causes of his left knee condition.

London considered these activities in rendering his opinion. Moreover, the record is replete with references to claimant's other post-surgery activities, and line dancing, karate and motorcycle riding were activities in which he engaged for many years prior to his right knee surgery. HT at 77, 79, 93, 100. Thus, employer should have reasonably learned of these activities in the investigation of claimant's claim of a right knee injury.

Moreover, the relevant time period in which employer must demonstrate prejudice is the time between claimant's date of awareness in June 2002, as this date triggered his obligation to provide notice, and the date formal notice was given in June 2003. Furthermore, as the causal connection between claimant's work for employer and his left knee condition is based on work activities which occurred prior to claimant's September 11, 2001, right knee surgery and subsequent activities, it is employer's ability to investigate this connection which is pertinent. Given employer's receipt of timely notice of claimant's right knee injury, which is the same type injury as claimant alleges with regard to his left knee, employer had previously received an opportunity to investigate claimant's working conditions. As noted, Dr. London provided a timely opinion based on several examinations and addressed the effect of claimant's work activities, his right knee surgery and his non-work activities.

In light of this evidence, we vacate the administrative law judge's finding that employer was prejudiced by the late notice and remand for further consideration of this particular issue. On remand, the administrative law judge must reconsider whether employer produced substantial evidence that it was prejudiced by claimant's lack of timely written notice given that it was aware of the nature of claimant's working conditions and produced evidence on the very issue it alleged it was not able to investigate. We note that employer bears the burden of showing that it was prejudiced by the untimely notice, 33 U.S.C. §920(b), and a conclusory allegation of prejudice or of an inability to investigate the claim when it was fresh is insufficient. *See Kashuba*, 139 F.3d 1273, 32 BRBS 62(CRT). If, on remand, the administrative law judge determines that Section 12(d)(2) is applicable, he must then consider claimant's entitlement to disability benefits related to his left knee condition.

Lastly, claimant asserts that if he prevails on the Section 12 issue, then the administrative law judge's order that his fee petition must be reduced by 50 percent should be overturned. As the administrative law judge has not, as yet, awarded or denied any attorney's fees in this case, claimant's contention is premature. *See generally Butler v. Ingalls Shipbuilding, Inc.*, 28 BRBS 114 (1994). Nevertheless, as claimant's success is a relevant consideration in issuing an award of attorney's fee, *Hensley v. Eckerhart*, 461 U.S. 424 (1983); *Ingalls Shipbuilding, Inc. v. Director, OWCP* [*Baker*], 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993), any additional benefits received by claimant on remand should be considered in determining an appropriate fee.

Accordingly, the administrative law judge's finding that employer was prejudiced by claimant's failure to provide timely written notice and thus that claimant's claim for disability benefits, based on his theory that his left knee condition is due to his work for employer, is barred by Section 12 of the Act is vacated, and the case is remanded for further consideration consistent with this opinion. In all other respects, the administrative law judge's decisions are 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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REGINA C. McGRANERY
Administrative Appeals Judge