BRB No. 00-1096

PHILLIP SCHMIDT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: Aug. 17, 2001
	)	
DUROCHER DOCK & DREDGE, INCORPORATED	)	
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION	)	
	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Christopher D. Kuebler (O'Bryan Baun Cohen), Birmingham, Michigan, for claimant.

Gregory P. Sujack (Garofalo, Schreiber & Hart, Chartered), Chicago, Illiniois, for employer/carrier.

Before: SMITH and DOLDER, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order (97-LHC-0165) of Administrative Law Judge Robert L. Hillyard 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 findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, a laborer, injured his back at work on September 30, 1994, while

assisting in the lifting of a 600-700 pound concrete mat. Claimant testified that he informed his supervisor of the accident after it occurred, but he did not file a claim for benefits until August 1, 1996. Claimant sought temporary partial disability benefits from the date of injury, September 30, 1994, to his layoff at employer's facility, December 16, 1994, and permanent partial disability benefits from December 16, 1994, and continuing.

The administrative law judge initially found that employer had knowledge of claimant's injury pursuant to Section 12(d), and that claimant timely filed his claim under Section 13, 33 U.S.C. §§912(d), 913. The administrative law judge found that claimant established invocation of the Section 20(a) presumption, 33 U.S.C. §920(a), that employer did not establish rebuttal of this presumption, and thus that claimant's back condition is work-related. The administrative law judge also found that claimant established his *prima facie* case of total disability and that employer established the availability of suitable alternate employment. The administrative law judge awarded claimant temporary partial disability benefits from September 30, 1994, to February 18, 1998, and permanent partial disability benefits from February 18, 1998, and continuing, and medical benefits pursuant to Section 7 of the Act, 33 U.S.C. §907.

On appeal, employer challenges the administrative law judge's findings pursuant to Section 12, and contends that the claim for benefits was untimely filed under Section 13. Employer also contends that the administrative law judge erred in finding that claimant established invocation of the Section 20(a) presumption, that employer did not establish rebuttal thereof, that claimant established his *prima facie* case of total disability, and that employer did not establish the availability of suitable alternate employment in marine construction jobs or in its facility after claimant's post-injury layoff. Employer further contends that the administrative law judge erred in awarding partial disability and medical benefits. Claimant responds in support of the administrative law judge's award of benefits to which employer replies.

Employer initially contends that the administrative law judge erred in determining that claimant's failure to give timely written notice of his injury was excused. Section 12 provides that in the case of a traumatic injury, as here, written notice of injury must be given within 30 days of the date of claimant's awareness of the relationship between his injury and his employment. 33 U.S.C. §912(a). Claimant's failure to give timely written notice of his injury is excused if employer had knowledge of the work-relatedness of the injury or if employer was not prejudiced by the failure to give timely notice of the injury. *See Sheek v. General Dynamics Corp.*, 18 BRBS 151 (1986), *modifying on recon.*, 18 BRBS 1 (1985); 33 U.S.C. §912(d)(1), (2)(1994). Prejudice under Section 12(d)(2) may be established

where employer demonstrates that due to claimant's failure to provide timely written notice, it was unable to effectively investigate to determine the nature and extent of the alleged illness or to provide medical services. *See Addison v. Ryan-Walsh Stevedoring Co.*, 22 BRBS 32 (1989). Pursuant to Section 20(b) of the Act, 33 U.S.C. §920(b), it is presumed that claimant's notice of injury was timely filed. *Shaller v. Cramp Shipbuilding & Dry Dock Co.*, 23 BRBS 140 (1989).

We reject employer's contention that the administrative law judge erred in finding employer had knowledge of claimant's injury when it occurred. The administrative law judge rationally found that employer had knowledge of claimant's injury based on claimant's testimony that he immediately reported the work accident to his supervisor, Mr. Boynton, who was one of two co-workers present at the time.[1] *See Boyd v. Ceres Terminals*, 30 BRBS 218 (1997); Decision and Order at 13; June 10, 1999, Tr. at 22, 27, 69. Pursuant to Section 702.216, actual knowledge shall be deemed to exist if the employee's immediate supervisor was aware of the injury. 20 C.F.R. §702.216. That employer knew of the injury on the date it occurred is further supported by employer's Section 30(a) report dated December 19, 1994, wherein it indicates that employer first knew of the accident on September 30, 1994, as it was reported to the project manager, Thomas Boynton. Cl. Ex. H. The administrative law judge thus properly concluded that claimant's failure to give written notice of the injury to the district director within 30 days of its occurrence does not bar the claim. *Sheek*, 18 BRBS 151. Employer's argument on appeal that it was prejudiced by claimant's failure to timely file his notice of injury lacks merit as it is merely a

[1]Despite employer's contentions to the contrary, it is immaterial how often claimant reminded Mr. Boynton about his injury. Moreover, that claimant continued to work until December 1994 with no lost time, may have earned more on a weekly basis post-injury, did not seek medical treatment for his back until after his layoff, only sought one medical appointment during the period between the alleged injury and his resignation, and then resigned without mentioning any injury also do not affect the fact that Mr. Boynton knew of claimant's work injury.

conclusory claim, and is, moreover, irrelevant in view of the administrative law judge's knowledge finding.[2] *See I.T.O. Corp. v. Director, OWCP [Aples]*, 883 F.2d 422, 22 BRBS 126 (CRT)(5th Cir. 1989); *Bustillo v. Southwest Marine, Inc.*, 33 BRBS 15 (1999); *Sheek*, 18 BRBS 151; Emp. Br. at 21. Thus, we affirm the administrative law judge's finding that claimant's failure to give timely written notice was excused as it is rational and supported by substantial evidence. *Boyd*, 30 BRBS 218.

[2]Employer states only that had claimant given timely notice, it could have taken steps to assist claimant in his allegedly injured state. Emp. Br. at 21.

Employer next contends that the administrative law judge erred in determining that claimant's claim for benefits was timely filed. Section 13 provides that in the case of a traumatic injury, the claim for benefits must be filed within one year after 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 and the injury. 33 U.S.C. §913; *Abel v. Director, OWCP*, 932 F.2d 819, 24 BRBS 130 (CRT)(9th Cir. 1991); *Newport News Shipbuilding & Dry Dock Co. v. Parker*, 935 F.2d 20, 24 BRBS 98(CRT)(4th Cir. 1991); *Gregory v. Southeastern Maritime Co.,* 25 BRBS 188 (1991). Claimant need not file a claim for benefits until he is aware that his work-related injury impairs his earning capacity. *Paducah Marine Ways v. Thompson*, 82 F.3d 130, 30 BRBS 33 (CRT)(6th Cir. 1996)*; see also J.M. Martinac Shipbuilding v. Director, OWCP*, 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). Under Section 20(b), there is a presumption that the claim for benefits was timely filed.[3] *Shaller*, 23 BRBS 140.

The administrative law judge concluded that claimant timely filed his claim on August 1, 1996, for his September 30, 1994, injury because the limitations period was tolled until March 27, 1998, when Dr. Newman reported that claimant's recent magnetic resonance imaging (MRI) demonstrated a disk herniation. *See* Decision and Order at 13-15. The administrative law judge characterized Dr. Jordan's 1994 and 1995 reports as not giving any diagnosis or relating claimant's back problems to his work accident. The administrative law judge noted that Dr. Shepard initially questioned any relationship between claimant's back problems and his work accident. The administrative law judge stated that Dr. Newman diagnosed a permanent disc herniation on March 27, 1998, related it to claimant's work accident if the history related to him by claimant was accurate, and opined that claimant should not return to an occupation that required certain activities. The administrative law judge thus found that prior to the time Dr. Newman diagnosed the disc herniation on March 27, 1998, neither Drs. Jordan nor Shepard diagnosed any work-related injuries or injuries which would impair claimant's wage-earning capacity.

As employer correctly argues, the administrative law judge erred in finding an awareness date after the date claimant filed his claim as the date of his claim is the last possible date that he could have been aware of an impairment in his earning capacity. *See Ceres Gulf, Inc. v. Director, OWCP [Fagan]*, 111 F.3d 17, 31 BRBS

[3]In this regard, we note that employer filed its Section 30(a) report on December 19, 1994. *See* 33 U.S.C. §930(a), (f).

21 (CRT)(5th Cir. 1997). It is not necessary that claimant receive medical confirmation of the work-relatedness of his condition if he was aware, or should have been aware, by other means that his injury affected his wage-earning capacity. *See Wendler v. American National Red Cross*, 23 BRBS 408 (1990)(McGranery, J., dissenting); *Aurelio v. Louisiana Stevedores, Inc.*, 22 BRBS 418 (1989), *aff'd mem.*, No. 90-4135 (5th Cir. March 5, 1991). Moreover, employer correctly points out that the administrative law judge did not discuss and weigh relevant evidence which may establish that claimant was aware that his work injury impaired his earning capacity at an earlier date. Claimant testified he self-limited his activities by not performing heavy work with employer and with subsequent post-injury employers and concealed his back problems from a different post-injury employer. *See* June 10, 1999, Tr. at 25, 38-40, 42-44, 46, 48-49, 80; Emp. Br. at 19-20. Additionally, claimant testified that he was in daily constant pain after the injury, and spent days resting when he was not working. June 10, 1999, Tr. at 26, 39, 47. Claimant also testified that he initially sought treatment with Dr. Jordan in December 1994, was diagnosed with two dislocated disks, and later sought treatment in 1995 with Dr. Shepard whom claimant testified imposed work restrictions. *See* Cl. Ex. E; June 10, 1999, Tr. at 37, 87-88. Thus, we vacate the administrative law judge's finding that claimant timely filed his claim. We remand the case to the administrative law judge for a discussion and weighing of all relevant evidence as to the date claimant was aware that his work injury impaired his wage-earning capacity, and whether claimant's claim was timely filed in relation to this date. *Pryor v. James McHugh Constr. Co.*, 18 BRBS 273 (1986).

Employer also contends that the administrative law judge erred in finding that claimant established invocation of the Section 20(a) presumption, and that it did not establish rebuttal thereof. Section 20(a) provides claimant with a presumption that the injury he sustained is causally related to his employment if he establishes a *prima facie* case by showing that he suffered an injury and that a work accident occurred which could have caused the injury or aggravated a pre-existing condition. *See Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187 (CRT)(5th Cir. 1999); *American Grain Trimmers, Inc. v. Director, OWCP [Janich]*, 181 F.3d 810, 33 BRBS 71 (CRT)(7th Cir. 1999), *cert. denied*, 120 S.Ct. 1239 (2000). Once claimant has invoked the Section 20(a) presumption, the burden shifts to employer to rebut it with substantial countervailing evidence that claimant's condition was not caused or aggravated by his employment. *See Prewitt*, 194 F.3d 684, 33 BRBS 187 (CRT); *American Grain Trimmers*, 181 F.3d 810, 33 BRBS 71 (CRT). An equivocal opinion is insufficient to establish rebuttal of the Section 20(a) presumption. *See O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000); *Phillips v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 94 (1988).

In finding that claimant established his *prima facie* case, *i.e.,* that an accident

occurred which could have caused his back problems, the administrative law judge rationally relied on claimant's uncontradicted testimony to this effect, which was corroborated by Dr. Newman's opinion that if an accident occurred, it was the cause of claimant's back problems.[4] *See Marinelli v. American Stevedoring, Ltd.*, 34 BRBS 112 (2000), *aff'd*, 248 F.3d 54, 35 BRBS 41 (CRT)(2d Cir. 2001); *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141 (1990); Decision and Order at 17-18; June 10, 1999, Tr. at 22; Cl. Exs. S, W at 27. Thus, we affirm the administrative law judge's finding that claimant established invocation of the Section 20(a) presumption.

[4]Despite employer's assertions that claimant's testimony is inconsistent and incredible, the administrative law judge's credibility determinations will not be overturned unless they are inherently incredible or patently unreasonable. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 1335, 8 BRBS 744, 747 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Moreover, that claimant worked 11 weeks post-injury for the same employer with the same or greater hours resulting in more pay and did not immediately seek medical care does not establish that an accident which could have caused claimant's back problems did not occur. Neither does the fact that Dr. Jordan's March 22, 1995, progress notes reflect a history of low back pain with no traumatic event establish that an accident did not occur especially in light of Dr. Jordan's earlier reporting on December 21, 1994, that claimant had an accident on September 30, 1994, while dragging reinforcement pads for a dredging company.

We also affirm the administrative law judge's finding that employer did not establish rebuttal. Contrary to employer's contentions, Dr. Shepard's opinions do not establish unequivocally that claimant's back problems were not caused or aggravated by his employment, and thus are insufficient to establish rebuttal.[5] *See O'Kelley*, 34 BRBS 39; *Phillips*, 22 BRBS 94; Decision and Order at 18-19; Emp. Ex. 2 at 15-17, 31, 36, 38; Exs. 2, 3 to Emp. Ex. 2. Additionally, that claimant may have performed heavy post-injury work does not establish that claimant's back problems are not work-related. Thus, the testimony of Messrs. Ross and Morrish are insufficient to establish rebuttal as well.[6] *See Id.*; Decision and Order at 18-19; Emp. Exs. 8, 9.

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[5]In his 1997 report of his 1995 examination of claimant, Dr. Shepard questioned the work-relatedness of claimant's back injury and stated that his back pain was no different from others experiencing back pain. Exhibit 3 to Emp. Ex. 2. In January 1998, Dr. Shepard noted that claimant's history is that his back pain had its onset with a job-related activity and that he had no back problems prior to a lifting incident that occurred while he was on the job in 1994. Exhibit 2 to Emp. Ex. 2. Most recently, in his June 10, 1998, deposition, Dr. Shepard stated that claimant's disc degeneration was caused by aging not trauma, that claimant's back pain had nothing to do with his disc degeneration but that it was plausible that the work accident contributed to his back problems. Emp. Ex. 2 at 15-17, 31, 36, 38.

[6]Mr. Morrish testified that foremen employed by Ryba Marine, such as claimant, were required to perform manual labor equal to that performed by the laborers. Emp. Ex. 9 at 7. Mr. Ross, one of claimant's co-workers at Ryba Marine, testified that claimant performed heavy work with him. Emp. Ex. 8.

Employer further contends that the administrative law judge erred in finding that claimant established his *prima facie* case of total disability and that employer did not establish the availability of suitable alternate employment in marine construction jobs or in its facility after claimant's post-injury layoff. Claimant establishes his *prima facie* case of total disability where he is unable to perform his usual employment duties due to a work-related injury. *See Gacki v. Sea-Land Service, Inc.*, 33 BRBS 127 (1998). The burden shifts then to employer to demonstrate within the geographic area where claimant resides, the availability of realistic opportunities which claimant, by virtue of his age, education, work experience, and physical restrictions, is capable of performing and for which he can compete and reasonably secure. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). Employer may meet this burden by offering claimant a light duty position in its facility. *See Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93 (CRT)(5th Cir. 1996); *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999).

The administrative law judge compared claimant's description of his usual work as a concrete laborer, which required heavy lifting, the use of jackhammers, assembling re-rod mats, clearing rubble by hand, pouring concrete, and carrying heavy oxygen cylinders, to the activities which Dr. Newman advised claimant to avoid; namely, prolonged lifting, walking, standing, sitting, climbing, bending, stooping, turning, and twisting, and reasonably concluded that claimant established his *prima facie* case of total disability.[7] *See Jennings v. Sea-Land Serv., Inc.,* 23 BRBS 12 (1989), *vacated on other grounds on recon.*, 23 BRBS 312 (1990); *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988); Decision and Order at 22-24; June 10, 1999, Tr. at 17-18, 89; Cl. Exs. A, W at 28-29. Consequently, we affirm the administrative law judge's finding that claimant is unable to perform his pre-injury work as it is rational and supported by substantial evidence.

The administrative law judge next found that employer established the availability of suitable alternate employment based on claimant's post-injury employment with employer as well as six different employers.[8] We reject

[7]That Dr. Newman did not examine claimant prior to February 18, 1998, does not mean that claimant cannot establish his *prima facie* case of total disability prior to this date. *See generally Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380, 384 n. 1 (1990). Moreover, the administrative law judge could rationally find that Dr. Newman's advising claimant to avoid certain activities was equivalent to the physician's imposition of restrictions. *Jennings v. Sea-Land Serv., Inc.*, 23 BRBS 12 (1989), *vacated on other grounds on recon.*, 23 BRBS 312 (1990); *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87 (1989).

[8]Claimant worked for employer post-injury from September 30, 1994, to

employer's contentions that the administrative law judge erred in finding that employer did not establish the availability of marine construction jobs. The administrative law judge rationally found that claimant's testimony that these jobs are frequently advertised in the paper is insufficient to establish the actual availability of such positions. *See generally Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989); Decision and Order at 25; June 10, 1999, Tr. at 50-51. Assuming, *arguendo*, that employer had established their availability, the administrative law judge rationally found that these jobs would not be suitable for claimant because they require heavy lifting. *See generally Armfield v. Shell Offshore, Inc.*, 30 BRBS 122 (1996); Decision and Order at 25; June 10, 1999, Tr. at 105-106. Moreover, the administrative law judge reasonably found that employer did not establish the availability of suitable alternate employment by offering claimant a job in its facility after his layoff in December 1994 because it did not specify the means by which it would accommodate claimant's work restrictions. *See generally Darby*, 99 F.3d 685, 30 BRBS 93 (CRT); *Ezell*, 33 BRBS 19; Decision and Order at 25; Emp. Ex. 7.

Employer additionally challenges the administrative law judge's award of partial disability benefits because, it asserts, claimant earned more post-injury with employer than pre-injury, claimant's post-injury earnings at Ryba Marine exceeded his pre-injury average weekly wage, and claimant earned in excess of $700 per

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December 16, 1994, was laid off, returned to work for employer for two days in June 1995, and resigned from employer's facility on June 4, 1995. June 10, 1999, Tr. at 39. Subsequently, claimant worked for Ryba Marine from June 1 through August 1, 1995, for Control Engineering from August 8 through October 27, 1995, November 6 through 17, 1995, February 5 through April 11, 1996, and May 14 through September 26, 1996, for Golf Course from October 6 through December 8, 1996, and May 4 through September 14, 1997, for Waterways from September 9 through 22, 1997, for Crown Golf from September 28 through November 30, 1997, and April through June 1998, and for Commercial/UAW/UBG from June 1998 through the time of the June 10, 1999, formal hearing. Emp. Exs. 3-6, 11.

week post-injury while working for Waterways. An award for partial disability compensation in a case not covered by the schedule is based on the difference between claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. §908(c)(21), (h); *Cook v. Seattle Stevedore Co.*, 21 BRBS 4, 6 (1988).

In awarding claimant partial disability benefits, the administrative law judge did not determine claimant's post-injury wage-earning capacity and whether claimant sustained a loss in wage-earning capacity; rather, as employer notes, the administrative law judge remanded the case to the district director for computation of the amounts of partial compensation due. As the determination of claimant's post-injury wage-earning capacity is for the administrative law judge as fact finder to make, we vacate the administrative law judge's award of partial disability benefits, and remand the case to the administrative law judge for necessary fact-finding. *See Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212 (CRT)(5th Cir. 1999); Decision and Order at 31. On remand, the administrative law judge first must determine whether claimant's actual earnings fairly and reasonably represent his wage-earning capacity pursuant to Section 8(h). *See Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 776 F.2d 1225, 18 BRBS 12 (CRT)(4th Cir. 1985), *aff'g* 16 BRBS 282 (1984); *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649 (1979). If they do not, the administrative law judge must determine claimant's post-injury wage-earning capacity, and whether claimant sustained a loss in wage-earning capacity, and is entitled to partial disability benefits. In this regard, the administrative law judge should discuss and weigh claimant's post-injury earnings with employer and the six other post-injury employers in view of the factors relevant to determining post-injury wage-earning capacity. *See Devillier*, 10 BRBS 649; Emp. Exs. 3-6, 11.

Employer lastly contends that the administrative law judge erred in awarding medical benefits. The Act does not require that an injury be economically disabling in order for a claimant to be entitled to medical expenses, but only that the injury be work-related. *See, e.g., Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380 (1990); 33 U.S.C. §907. In order for a medical expense to be assessed against employer, the expense must be both reasonable and necessary for the treatment of claimant's work-related injury. *Romeike v. Kaiser Shipyards*, 22 BRBS 57, 60 (1989). Employer does not challenge the propriety of any specific medical treatment, and based on our affirmance of the administrative law judge's finding that claimant's back injury is work-related, we affirm the award of reasonable and necessary work-related medical expenses.

Accordingly, the administrative law judge's findings that claimant's claim was timely filed and that claimant is entitled to partial disability benefits are vacated, and the case is remanded to the administrative law judge for further findings consistent with this decision. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge