BRB No. 00-465

LEON BOLDEN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: Jan 26, 2001
INGALLS SHIPBUILDING, INCORPORATED	)	
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

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

Ellen T. Turner, Mobile, Alabama, for claimant.

Paul M. Franke, Jr. (Franke, Rainey & Salloum, P.L.L.C.), Gulfport, Mississippi, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order and the Decision on Motion for Reconsideration (1998-LHC-1373) 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 for over 19 years, excluding lay offs, as an electrician and as a material runner in the electrician's department. He testified that in early 1995 he began suffering from tightness, numbness and pain in his legs and feet. In February 1995, he was evaluated by a chiropractor who considered the problem to be caused by a back condition and referred claimant to Dr. Semon, an orthopedic surgeon, who diagnosed a

ruptured or bulging disc and performed a discography and percutaneous discectomy in May 1995. The procedure was unsuccessful, so Dr. Semon recommended an open laminectomy. Cl. Ex. 1. Claimant declined further invasive procedures, and he changed doctors. Dr. Fontana, his treating orthopedic surgeon, confirmed the previous diagnosis and also diagnosed degenerative disc disease. Emp. Ex. 15 at 11-12. Claimant, who has not worked since May 1995, filed a claim for benefits in September 1995.

The administrative law judge found that claimant failed to give timely notice of the injury to employer under Section 12(a) of the Act, 33 U.S.C. §912(a). Decision and Order at 8. He then found that Section 12(d), 33 U.S.C. §912(d), did not apply to excuse claimant's failure to give timely notice because employer had no knowledge of the work-relatedness of the injury, due to claimant's certification on his health insurance forms that the injury was non-industrial and due to his relating the injury to a non-work-related 1988 injury. He also found that employer was prejudiced by the late notice, as employer was prevented from effectively investigating the claim, obtaining a second opinion regarding the origin of the back condition prior to surgery or participating in claimant's medical care. *Id.* at 9-10. Consequently, the administrative law judge denied the claim, *id.* at 10-11, and summarily denied claimant's motion for reconsideration. Claimant appeals, and employer responds, urging affirmance.

Claimant contends the administrative law judge erred in concluding that he failed to timely notify employer of his injury. Claimant argues that the administrative law judge erred in determining claimant was aware of the relationship between his injury, disability and employment more than 30 days prior to September 1995. Claimant also contends the administrative law judge erred in failing to determine whether his injury is a traumatic injury or an occupational disease, thereby failing to ascertain whether the one-year time limit for giving notice in an occupational disease case applies. Employer asserts the administrative law judge correctly determined that this is a traumatic injury and that claimant's notice to it in September 1995 was untimely.

Section 12(a) of the Act requires a notice of injury, in a case involving a traumatic injury, to be filed within 30 days of the date on which the claimant becomes aware, or should have been aware, of the relationship between his injury, his disability and his employment. *See Bechtel Associates, P.C. v. Sweeney*, 834 F.2d 1029, 20 BRBS 49(CRT) (D.C. Cir. 1987); 20 C.F.R. §702.212(a). If the case involves an occupational disease, Section 12(a) requires notice to be filed within one year after the claimant becomes aware, or should have been aware, of the relationship between his employment, his disease, and his disability. 20 C.F.R. §702.212(b). The burden of establishing that claimant's notice was untimely is on

[1]Doctors agree claimant cannot return to his usual work due to his back condition and vascular disease in both legs. Claimant also has a three percent pre-existing permanent partial disability due to a work-related wrist injury. Cl. Ex. 1; Emp. Ex. 15 at 34, 46, 49.

employer. 33 U.S.C. §920(b); *Shaller v. Cramp Shipbuilding & Dry Dock Co.*, 23 BRBS 140 (1989).

In this case, review of the administrative law judge's decision reveals errors in his analysis which prevent our affirming his conclusion that claimant's notice was untimely under Section 12(a). For the following reasons, therefore, we must vacate his decision and remand the case for further consideration. First, the administrative law judge failed to ascertain claimant's date of awareness. While the administrative law judge stated that claimant first noticed symptoms in February 1995 and then complained of those same symptoms to an orthopedic surgeon in April 1995, but did not file a claim for compensation until September 1995, these findings are insufficient to establish that claimant was aware of the relationship between his injury and his employment, as they do not establish that claimant was aware that these symptoms were related to his employment. Moreover, claimant is not aware of a work-related injury until he knows, or has reason to know, of the likely impairment of his earning capacity. *See, e.g., Marathon Oil Co. v. Lunsford,* 733 F.2d 1139, 16 BRBS 100(CRT)(5th Cir. 1984). In this case, the administrative law judge did not determine the date on which claimant became aware of the relationship between his injury, his loss in wage-earning capacity, and his employment. Without this date, it is impossible to determine whether employer was notified of the injury in a timely manner. *See, e.g., Ceres Gulf, Inc. v. Director, OWCP [Fagan],* 111 F.3d 17, 31 BRBS 21(CRT) (5th Cir. 1997); *Bivens v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 233 (1990). Consequently, on remand, the administrative law judge must determine the date on which claimant was aware or should have been aware his condition was related to his employment.

Additionally, the administrative law judge did not make a finding as to whether claimant's condition is the result of a traumatic injury or whether it is the manifestation of an occupational disease. This determination is crucial to the application of Section 12(a) as there are differing time limitations. 33 U.S.C. §912(a). The evidence reveals that claimant has been diagnosed with degenerative disc disease and with a bulging or ruptured disc. Cl. Exs. 1, 6; Emp. Ex. 15 at 11-12. Without specifically making a finding on this matter, which claimant raised before him, the administrative law judge merely agreed with employer that the filing of the claim, which acted as claimant's notice of injury, did not occur within 30 days of either March or May 1995. Decision and Order at 8. On remand, the administrative law judge must determine whether claimant's condition is due to a traumatic injury or an

[2]We reject, however, claimant's argument that notice to employer was timely because he did not realize he could file a claim without knowing an exact date of injury until he met with an attorney for another, unrelated, reason. The test for determining the timeliness of a notice of injury is when claimant was or should have been aware of the relationship between his injury or disease, his disability and his employment, not when he became aware he could file a claim. *See generally Aurelio v. Louisiana Stevedores, Inc.*, 22 BRBS 418 (1989), *aff'd mem.*, No. 90-4135 (5th Cir. March 5, 1991).

occupational disease and apply the Section 12(a) limitations accordingly. *See LeBlanc v. Cooper/T. Smith Stevedoring, Inc.*, 130 F.3d 157, 31 BRBS 195(CRT) (5th Cir. 1997); *Gencarelle v. General Dynamics Corp.*, 892 F.2d 173, 23 BRBS 13(CRT) (2d Cir. 1989); *McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon. en banc*, 32 BRBS 251 (1998).

Our review of the administrative law judge's decision also reveals that he placed the initial burden of establishing the timeliness of the notice on claimant rather than on employer. Decision and Order at 8. Specifically, he concluded that claimant's testimony regarding when he became aware of the work-relatedness of his injury is "inconclusive at best" and cannot meet claimant's burden under Section 12(a). *Id.* The Section 20(b), 33 U.S.C. §920(b), presumption, however, applies in determining whether a Section 12 notice has been filed in a timely manner, thereby requiring an employer to present substantial evidence to the contrary. *Stevenson v. Linens of the Week*, 688 F.2d 93 (D.C. Cir. 1982); *Avondale Shipyards, Inc. v. Vinson*, 623 F.2d 1117, 12 BRBS 478 (5th Cir. 1980); *Shaller*, 23 BRBS 140. On remand, the administrative law judge must afford claimant the benefit of the Section 20(b) presumption in ascertaining whether his notice to employer was timely. *See Bivens*, 23 BRBS 233.

Although the administrative law judge's finding that notice was not timely under Section 12(a) must be vacated and the case remanded, in the event that on remand he finds claimant's notice was not timely, we will address his determination that the untimely filing is not excused under Section 12(d). Section 12(d)(1) excuses an untimely filing under Section 12(a) if the employer had knowledge of the injury or disease, or under Section 12(d)(2), an untimely filing is excused if the employer was not prejudiced thereby. 33 U.S.C. §912(d); *Sheek v. General Dynamics Corp.*, 18 BRBS 151 (1986), *modifying* 18 BRBS 1 (1985); 20 C.F.R. §702.216. The administrative law judge found that employer did not know claimant's injury was related to his work at any time prior to the date claimant filed a claim for compensation. Decision and Order at 9. This finding is supported by the evidence of record. Claimant testified he did not know when the injury occurred, and he did not want to lie if it had not occurred at work. Emp. Ex. 14 at 73; Tr. at 93. When asked by doctors what he thought may have caused his injury, claimant related only his 1988 non-work injury when he fell through a ceiling as a potential cause. Cl. Exs. 1, 6 at 9; Emp. Ex. 15 at 11. For this reason, he certified on his group health insurance form that the injury was non-industrial. Emp. Ex. 7. Such certification is sufficient to rebut the Section 20(b) presumption and to preclude application of the knowledge exception. *Janusziewicz v. Sun Shipbuilding & Dry Dock Co.*, 677 F.2d 286, 14 BRBS 705 (3d Cir. 1982); *Addison v. Ryan-Walsh Stevedoring Co.*, 22 BRBS 32 (1989); *Mattox v. Sun Shipbuilding & Dry Dock Co.*, 15 BRBS 162 (1982) (Miller, J., dissenting). Therefore, we affirm the administrative law judge's finding that employer did not have knowledge of this injury under Section 12(d)(1).

The administrative law judge also found that employer was prejudiced by the timing of claimant's notice because it was unable to investigate the injury or assist with the medical

care for at least six months before being notified. During that time, claimant had been treated and had undergone an unsuccessful surgery. This conclusion is rational if claimant was aware that his condition was related to his employment in March or May 1995. However, if claimant become aware after that date, then the judge must reconsider his prejudice finding consistent with claimant's date of awareness. The issue in that event is whether employer was prejudiced by a delay, if any, between the date claimant became "aware" and the date employer received notice. Therefore, if the administrative law judge finds that employer presented sufficient evidence to rebut the Section 20(b) presumption, and that claimant's notice of injury was untimely under Section 12(a), then claimant's claim for compensation must be denied, as the Section 12(d) excuses do not apply.

Claimant also contends the administrative law judge erred in not addressing his claim for medical benefits. Section 7 of the Act, 33 U.S.C. §907, provides that an employer is liable for reasonable expenses related to the medical treatment of a claimant's industrial injury. Entitlement to medical benefits is never time-barred, *Ryan v. Alaska Constructors, Inc.*, 24 BRBS 65 (1990), and is based upon the demonstration that the treatment is reasonable and necessary for a work-related injury or condition. *Buckland v. Dep't of the Army/NAF/CPO*, 32 BRBS 99 (1997); *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988). In this case, the administrative law judge denied claimant's claim in its entirety after concluding he failed to give timely notice of the injury. However, his findings under Section 12 are irrelevant to claimant's entitlement to medical benefits. On remand, the administrative law judge must address whether claimant is entitled to medical benefits.

Accordingly, the administrative law judge's Decision and Order is vacated, and the case is remanded for consideration consistent with this opinion.

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[3]Contrary to claimant's assertions, this case is not significantly distinguishable from *Kashuba v. Legion Ins. Co.*, 139 F.3d 1273, 32 BRBS 62(CRT) (9th Cir.1998), *cert. denied*, 525 U.S. 1102 (1999), on those facts. In that case, the United States Court of Appeals for the Ninth Circuit found that the employer was prejudiced by the claimant's failure to notify it of his injury until six weeks after he had surgery. Such late notice, according to the Ninth Circuit, impeded the employer's ability to disprove its liability, to determine the nature and extent of the disability and to provide effective medical services, and thereby possibly avoid surgery. *Kashuba*, 139 F.3d 1273, 32 BRBS 62(CRT); *cf. Bustillo v. Southwest Marine, Inc.*, 32 BRBS 15 (1999) (record lacked evidence of prejudice). Similarly, employer in this case was not informed of claimant's injury until after an unsuccessful operation and, thus, was not able to obtain a second opinion or investigate the nature and extent of the disability prior to that unsuccessful operation. Thus, if claimant were "aware" at the time of the surgery, then *Kashuba* would apply.

[4]If the administrative law judge awards either medical or disability benefits, he must also address claimant's petition for an attorney's fee. 33 U.S.C. §928.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge