

BRB Nos. 90-913
and 90-913A

JAMES I. FEARY)
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 Claimant-Petitioner)
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 v.)
)
 KIEWIT PACIFIC COMPANY) DATE ISSUED:
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 and)
)
 AETNA LIFE CASUALTY COMPANY)
)
 Employer/Carrier-)
 Respondents)
)
 and)
)
 HOOD CORPORATION)
)
 and)
)
 ALEXIS RISK MANAGEMENT,)
 INCORPORATED)
)
 Employer/Carrier)
 Intervenor-Petitioners) DECISION and ORDER

Appeal of the Decision and Order of Nahum Litt, Chief Administrative Law Judge, United States Department of Labor.

Lowell K. Y. Chun-Hoon (King, Nakamura & Chun-Hoon), Honolulu, Hawaii, for claimant.

Cynthia A. Farias and Burgess A. Dell-Wilson (Alcantra & Frame), Honolulu, Hawaii, for employer/carrier-respondents.

Wesley M. Fujimoto and Wayne W. H. Wong (Torkildson, Katz, Jossem, Fonseca, Jaffe, & Moore), Honolulu, Hawaii for employer/carrier-intervenors.

Before: STAGE, Chief Administrative Appeals Judge, BROWN and DOLDER,

Administrative Appeals Judges.

PER CURIAM:

Claimant and employer/intervenor, Hood Corporation (Hood), appeal the Decision and Order (87-LHC-1973) of Chief Administrative Law Judge Nahum Litt denying benefits 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 if they are rational, supported by substantial evidence, and in accordance with law. *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

During the course of his employment with Hood, claimant injured his back and neck on April 10, 1985. He filed a claim pursuant to the workers' compensation statute of Hawaii. Claimant was represented by Mel Kalama, an administrative aide for claimant's union. Hood voluntarily paid claimant benefits under state law. In the course of treating his injury, medical tests revealed pre-existing degenerative spinal disease. Claimant was released to return to work without restriction by his treating physician on June 25, 1985. KX 8, 13. He was assigned to work for Kiewit Pacific Company (Kiewit) on July 11, 1985. On July 17, 1985, claimant slipped and fell on his back while in the course of his employment with Kiewit. Tr. 26-30. He has not returned to work. Mr. Kalama construed claimant's second injury as a recurrence of his initial injury, based on his belief that filing a claim against Kiewit would result in Hood's terminating claimant's benefits, which Hood had voluntarily resumed after the July 17 injury. KX 18. When Hood terminated claimant's benefits on October 4, 1985, claimant filed a state claim against Kiewit on October 24, 1985. KX 1. The claim was rejected for lack of jurisdiction, and claimant therefore filed a claim for benefits under the Act on November 17, 1985. KX 4. Prior to the formal hearing, Hood intervened in order to obtain reimbursement from Kiewit for benefits and medical expenses incurred subsequent to claimant's July 17 injury. The parties agreed that: claimant sustained a work-related injury on July 17, 1985; claimant failed to give timely written notice under Section 12(a) of the Act, 33 U.S.C. §912(a); and claimant is permanently and totally disabled. Tr. at 11-12, 15. Kiewit contested the claim on the basis of untimely notice. Alternatively, it argued that claimant's July 17 injury caused only a temporary aggravation of claimant's pre-existing back impairment. Tr. at 5, 16. Kiewit also requested Section 8(f) relief from continuing compensation liability, 33 U.S.C. §908(f). Tr. at 16.

The administrative law judge found that claimant's failure to give timely written notice of his work-related injury was not excused pursuant to Section 12(d)(1), (d)(2) or (d)(3)(ii) of the Act, 33 U.S.C. §912(d)(1), (2), (3)(ii)(1988). Accordingly, the administrative law judge denied the claim for benefits. Pursuant to Section 12(d)(2) the administrative law judge found that Kiewit was prejudiced by claimant's failure to give timely written notice. The administrative law judge reasoned that the injury site had been substantially altered by the time Kiewit received notice, and that, therefore, it was unable to investigate the circumstances of the injury. He also determined that Kiewit was unable to question witnesses while their memories were still fresh. Finally, the administrative law judge found that Kiewit was unable to determine the extent of the injury claimant

suffered in its employment, and it was unable to obtain a baseline medical evaluation to determine if claimant sustained any subsequent injuries.

Claimant and Hood appeal the administrative law judge's denial of benefits. Petitioners also appeal the administrative law judge's failure to address claimant's entitlement to medical benefits. Kiewit responds, urging affirmance of the administrative law judge's findings pursuant to Section 12.

Pursuant to Section 12(d)(1) and (2), failure to provide timely written notice as required by Section 12(a) will not bar the claim if employer has knowledge of the injury or the employer is not prejudiced by the failure to give formal notice. *See generally Sheek v. General Dynamics Corp.*, 18 BRBS 151 (1986), *decision on recon. modifying* 18 BRBS 1 (1985); 33 U.S.C. §912(d)(1988). Section 20(b) of the Act, 33 U.S.C. §920(b), creates a presumption that, in the absence of substantial evidence to the contrary, employer has been given sufficient notice under Section 12. *See generally Shaller v. Cramp Shipbuilding & Dry Dock Co.*, 23 BRBS 140, 145-146 (1989). Accordingly, to rebut the presumption under Section 12(d)(2), employer bears the burden of proving by substantial evidence that it has been prejudiced by an inability to effectively investigate some aspect of the claim by reason of claimant's failure to provide timely formal notice pursuant to Section 12. *See generally Bivens v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 233 (1990).

In the instant case, we hold that Kiewit failed to provide substantial evidence that it was prejudiced by its failure to receive timely formal notice. Initially, whether it was unable to determine the circumstances of claimant's injury and question witnesses while their memories were still fresh are not relevant to Kiewit's defense on this claim. Significantly, the administrative law judge accepted the parties' stipulation that claimant sustained a work-related injury on July 17. Decision and Order at 1. Since the occurrence of the injury at work is not at issue, any challenge to the merits of the claim did not require that Kiewit investigate the circumstances of claimant's injury and question witnesses while their memories were fresh.¹ Accordingly, the administrative law judge's reliance on these factors was speculative and therefore was in error. *See I.T.O. Corp. v. Director, OWCP*, 883 F.2d 422, 22 BRBS 126 (CRT)(5th Cir. 1989).

We also hold that the administrative law judge erred in finding that Kiewit was prejudiced because it was unable to effectively investigate the extent of claimant's July 17 injury. There is ample evidence of record from which Kiewit can determine the extent of any impairment attributable to claimant's July 17 neck and back injury. Claimant obtained treatment for this injury on August 3, 1985, and there is no evidence that Kiewit was prejudiced by the lack of a medical evaluation prior to this date. In finding prejudice, the administrative law judge relied on the testimony of claimant's supervisor, Mr. Landry, that had he known of the injury, he would have

¹Mr. Landry, claimant's supervisor, testified that employer sometimes investigates the circumstances of work injuries to determine if safety procedures are warranted to prevent a recurrence. Mr. Landry also indicated that his memory of claimant's actions on the day of injury was less than fresh. Safety considerations and claimant's conduct on the day of the injury are not relevant in this case, as investigation of the claim did not require inquiry into the cause of claimant's July 17, 1985 back injury. *See Bivens v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 233 (1980).

insured immediate medical attention. In the context of the voluminous medical record, however, there is no evidence that the three-week delay caused any prejudice. If claimant had given timely formal notice, employer would have been notified only within 30 days; the Act does not require "immediate" notification.

Employer, moreover, received written notice after claimant filed a claim for state compensation benefits on October 5, 1985 - approximately three months after the work injury. KX 4, 19 at 21. The record contains numerous medical reports produced prior to Kiewit's receipt of written notice which document the nature and extent of claimant's April 10 and July 17, 1985, work injuries, enabling a judge to determine which injury has caused claimant's disability. Specifically, Kiewit proffered the results of an examination conducted on June 13, 1985, and the treating physicians' records from claimant's first back injury on April 10, 1985 through June 25, 1985. KX 9, 10, 13. The record also contains physicians' reports from August 3 through September 30, 1985, which attest to claimant's treatment after the July 17, 1985 injury. Kiewit also was able to review numerous medical reports authored between October 30, 1985 through June 17, 1987, and the results of independent medical examinations conducted on January 1, January 31, May 6, and September 8, 1986. Accordingly, the record establishes that claimant received regular and continuous medical treatment both before and after Kiewit received notice, and that Kiewit had ample access to several medical sources which enabled it to independently assess the extent, if any, that claimant's totally disabling back impairment is attributable to the July 17 injury. The administrative law judge's finding that employer was unable to determine the extent of the disability attributable to claimant's July 17 injury is thus not supported by the evidence of record. *See Steed v. Container Stevedoring Co.*, 25 BRBS 210, 216-217 (1991).

Finally, we hold that the administrative law judge erred by crediting employer's argument that it was prejudiced because it was unable to determine if claimant sustained additional injuries after the July 17 work injury. As stated above, Kiewit had access to the records of claimant's continuous treatment for two years after the injury. *Steed*, 25 BRBS at 216-217. Moreover, none of the treating physicians' reports provide evidence of a subsequent injury, nor is there any other evidence of further injury. Accordingly, the administrative law judge's finding that Kiewit was prejudiced because it was unable to ascertain whether claimant suffered a later aggravation is based on sheer speculation and is unsupported by the record. *See generally I.T.O Corp.*, 883 F.2d at 422, 22 BRBS at 126 (CRT). Since the administrative law judge's findings that Kiewit rebutted the Section 20(b) presumption and was prejudiced by claimant's failure to provide timely written notice are not supported by substantial evidence, the administrative law judge's conclusion that claimant's failure to comply with Section 12(a) was not excused pursuant to Section 12(d)(2) is reversed.² *See generally Cox v. Brady-Hamilton Stevedore Co.*, 25 BRBS 203 (1991). This case must be remanded for consideration of the remaining issues.

By virtue of the parties' stipulation that claimant was injured in the course of his employment

²Accordingly, we need not address the arguments of claimant and Hood that the administrative law judge erred by finding that claimant's failure to comply with Section 12(a) was not excused pursuant to Section 12(d)(1) and (d)(3)(ii).

with Kiewit on July 17, 1985, claimant is entitled to medical benefits necessary for treatment due to that injury. *See generally Colburn v. General Dynamics Corp.*, 21 BRBS 219 (1988); 33 U.S.C. §907(a). The administrative law judge failed to address claimant's entitlement to medical benefits, and these benefits are never time-barred. *See Addison v. Ryan-Walsh Stevedoring Co.*, 22 BRBS 32, 36 (1989). Moreover, in a footnote, the administrative law judge found, without explanation, that claimant was totally disabled due to the April 10, 1985, injury, and that his July 17 injury involved only a temporary aggravation. Decision and Order at 8 n.3. Notwithstanding the administrative law judge's statement, the Board must remand the case for the administrative law judge to determine the nature and extent of claimant's disability due to the July 17 injury and whether Kiewit is liable for any medical benefits for this injury. On remand, the administrative law judge must explicitly weigh the medical evidence and state the rationale for his conclusions. *See Ballesteros v. Willamette Western Corp.*, 20 BRBS 184, 187 (1988); 5 U.S.C. §557(C)(3)(A). After determining the nature and extent of claimant's July 17, 1985 injury, the administrative law judge must also address any remaining issues including Hood's argument that it is entitled to reimbursement for compensation and medical benefits it paid claimant after his second injury, and Kiewit's petition for Section 8(f) relief.

Accordingly, the administrative law judge Decision and Order denying benefits is reversed, and this case is remanded for further proceedings consistent with this decision.

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge