BRB No. 04-0822

CHARLENE M. HILLIARD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ZEN-NOH GRAIN CORPORATION	)	DATE ISSUED: 07/21/2005
	)	
and	)	
	)	
FARMLAND MUTUAL INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Larry W. Price, Administrative Law Judge, United States Department of Labor.

William R. Mustian, III (Stanga & Mustian, P.L.C.), Metairie, Louisiana, for claimant.

Charles M. Lanier, Jr., and Alison A. Bradley (Christovich & Kearney, L.L.P.), New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2003-LHC-2054) of Administrative Law Judge Larry W. Price 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 alleges she suffered an injury to her lower spine and right wrist on August 24, 2000, while pulling the cover off a dust tank.[1] She continued performing her usual job duties and did not seek medical attention until August 28. Claimant's last day of work for employer was September 3, 2000.[2] Claimant alleges she reported the workplace incident on September 6, 2000, HT at 14-15; employer counters that claimant did not inform the plant superintendent of a work accident until June 8, 2001. HT at 40-41.

In his Decision and Order, the administrative law judge found claimant's notice of injury was not timely provided under Section 12(a), 33 U.S.C. §912(a), and that such failure was not excused by operation of Section 12(d), 33 U.S.C. §912(d). Assuming, *arguendo,* that her claim was not time-barred, the administrative law judge further found that claimant failed to establish that her back injury or carpal tunnel syndrome is work-related and that claimant currently suffers no disability that would prevent her return to her usual job duties. Accordingly, the administrative law judge denied benefits, as well as medical expenses related to those conditions.

Claimant appeals, arguing that the administrative law judge erred in finding that her claim is time-barred, that her injuries are not work-related, and that she is not disabled. Employer responds, urging affirmance.

In a traumatic injury case such as this one, claimant must give employer written notice of her injury within 30 days of her awareness of the relationship between the injury and the employment. 33 U.S.C. §912(a). In the absence of substantial evidence to the contrary, Section 20(b), 33 U.S.C. §920(b), presumes that the notice of injury was timely filed. *Steed v. Container Stevedoring Co.*, 25 BRBS 210 (1991). The administrative law judge found that claimant failed to provide to employer timely written notice that she had suffered an injury at work. Although claimant alleges that on September 6, 2000, she informed employer that she had suffered an injury, she conceded at the hearing that she had not told her supervisor that her injury was sustained at work.[3]

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[1] Claimant testified that she suffers from chronic neck and back pain and currently takes narcotic pain medication which limits her ability to work. HT at 17-19. Claimant also underwent surgery for carpal tunnel syndrome on June 28, 2001, and alleges she is unable to use her hands to full capacity. HT at 26.

[2] Claimant is technically still employed by employer but is considered to be out on long-term disability, HT at 39; she followed company absentee policy of calling in every Friday from October 2000 through October 2002.

[3] The administrative law judge did not make a finding regarding claimant's date of awareness of the relationship between her injury and her employment. As claimant

HT at 21-23. Moreover, the administrative law judge found that claimant called in every Friday per company rules, but did not mention the work-relatedness of her condition to employer until June 2001. Thus, as it is supported by substantial evidence, we affirm the administrative law judge's conclusion that claimant did not give employer timely notice of her injury.

Failure to provide timely or adequate notice of an injury, as required by Section 12(a), bars a claim unless it is excused under Section 12(d). *Sheek v. General Dynamics Corp.*, 18 BRBS 15, *dec. on recon. modifying* 18 BRBS 1 (1985). Because Section 12(d) is written in the disjunctive, claimant's failure to provide timely notice of injury may be excused for any of three reasons: employer had actual knowledge of the injury, employer was not prejudiced by claimant's failure to file a timely notice of injury, or the district director excused the failure to file.[4] *Boyd v. Ceres Terminals*, 30 BRBS 218 (1997). "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).

Claimant contends that employer knew or should have known that her condition was work-related at the time she filed her claim for long-term disability benefits on September 28, 2000. Knowledge of the work-relatedness of an injury may be imputed where employer knows of the injury and has facts that would lead a reasonable person to conclude that compensation liability is possible so that further investigation is warranted. *Bustillo v. Southwest Marine, Inc.*, 33 BRBS 15 (1999). The form claimant filed, EX 16, however, did not state that her symptoms were related to a work injury, alleging rather

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testified she first was off work on September 6, 2000, due to her alleged injury, this date may establish claimant's date of awareness. *See Ceres Gulf, Inc. v. Director, OWCP*, 111 F.3d 17, 31 BRBS 21(CRT) (5th Cir. 1997); *see generally Bath Iron Works Corp. v. Preston*, 380 F.3d 597 38 BRBS 60(CRT) (1st Cir. 2004).

[4] Section 12(d) of the Act states 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]… .

33 U.S.C. §912(d).

that they arose out of illness. Moreover, claimant continued to seek coverage for her medical treatment from her personal health insurance carrier, repeatedly stating that the condition was not work-related. *See*, *e.g.*, CX 1; EXS 13, 16; HT at 22-23. The Section 12(d) knowledge exception is precluded where, as here, claimant has certified on her group health insurance form that her injury is not work-related. *See Sun Shipbuilding & Dry Dock Co. v. Walker*, 590 F.2d 73, 9 BRBS 399 (3d Cir. 1978); *see also Janusziewicz v. Sun Shipbuilding & Dry Dock Co.*, 677 F.2d 286, 14 BRBS 705 (3d Cir. 1982); *Addison*, 22 BRBS at 35. As the administrative law judge's finding that employer did not have knowledge of the work-relatedness of claimant's injury until June 2001 is supported by substantial evidence and in accordance with law, we affirm the finding that the lack of formal notice cannot be excused under Section 12(d)(1). *Forlong v. American Security & Trust Co.*, 21 BRBS 155 (1988).

Claimant further argues that the administrative law judge erred in failing to find that employer was not prejudiced by any untimely notice of injury. To establish prejudice, employer bears the burden of proving by substantial evidence that it has been unable to effectively investigate some aspect of the claim or to provide medical services due to claimant's failure to provide timely notice pursuant to Section 12. 33 U.S.C. §920(b); *Strachan Shipping Co. v. Davis*, 571 F.2d 968, 8 BRBS 161 (5th Cir. 1970); *Bivens v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 233 (1990). A conclusory allegation of an inability to investigate the claim when it was fresh is insufficient to establish prejudice. *ITO Corp. v. Director, OWCP*, 883 F.2d 422, 22 BRBS 126(CRT) (5th Cir. 1989).

The administrative law judge found that the extended period of time between the alleged injury and claimant's notice to employer precluded employer from effectively investigating the nature of the injury. Employer's physicians, Drs. Steiner and Montz, performed evaluations two years after the injury allegedly occurred and could only speculate as to the nature of any back injury sustained. EXs 3, 5. The administrative law judge noted that, in fact, both physicians opined that at the time of their examinations claimant exhibited no objective evidence to support her subjective complaints. Therefore, the administrative law judge concluded that employer was prejudiced by claimant's delay in notifying employer that her back had been injured because it was unable to determine what immediate back trauma claimant suffered and to participate in its resolution.[5]

We cannot affirm the administrative law judge's determination that employer carried its burden of proof in establishing that it was prejudiced by claimant's delay in

[5] In this regard, the administrative law judge focused primarily on claimant's alleged back injury and did not specifically discuss claimant's carpal tunnel syndrome.

giving notice of her injury. Employer presents no evidence other than its conclusory statement that it was unable to participate in the early stages of claimant's medical treatment. Employer does not allege that such supervision would have altered the course of claimant's treatment. *See Kashuba v. Legion Ins. Co.*, 139 F.3d 1273, 32 BRBS 62(CRT) (9th Cir.1998), *cert. denied*, 525 U.S. 1102 (1999); *Bustillo*, 33 BRBS 15. Indeed, employer's belated investigation into this claim produced only evidence that supports its contention that claimant has no work-related disability. As claimant contends, employer has failed to carry its burden of establishing prejudice by presenting only generalized statements, not specific evidence, of its inability to effectively oversee claimant's medical care due to claimant's failure to provide timely notice. Because employer has failed to carry its burden pursuant to Section 20(b), the administrative law judge's finding that employer was prejudiced by the lack of timely notice and that claimant's failure to give timely notice was not excused under Section 12(d)(2) cannot stand. *Bustillo*, 33 BRBS 15. Therefore, the finding that the disability claim is barred by Section 12 is reversed.

Claimant next argues that the administrative law judge erred in finding that her back and wrist conditions are not work-related.[6] In establishing that an injury is causally related to her employment, claimant is aided by the Section 20(a) presumption, which provides a presumed causal nexus between the injury and the employment. In order to be entitled to the Section 20(a) presumption, however, claimant must establish a *prima facie* case by proving the existence of an injury or harm and that a work-related accident occurred or that working conditions existed which could have caused or aggravated the harm. *See Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996); *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1993); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). It is claimant's burden to establish each element of her *prima facie* case by affirmative proof. *See Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994). The Section 20(a) presumption does not apply to aid claimant in establishing her *prima facie* case. *See Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981).

We cannot affirm the administrative law judge's finding that claimant did not sustain any work-related injuries. The administrative law judge did not make specific findings of fact with regard to each element of claimant's *prima facie* case The administrative law judge found no "harm" to claimant's back to demonstrate that the

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[6] Assuming, *arguendo*, that the administrative law judge's findings pursuant to Section 12 could be affirmed, the issue of causation must be addressed because a claim for medical benefits is never time-barred. *Siler v. Dillingham Ship Repair*, 28 BRBS 38 (1994) (decision on recon. en banc).

accident never occurred, yet he assumed the existence of the work accident to demonstrate that it could not have caused claimant's carpal tunnel syndrome. Decision and Order at 14-15. Moreover, with regard to the carpal tunnel syndrome, assuming the occurrence of a work accident, the administrative law judge did not address whether such accident could have aggravated claimant's pre-existing condition.[7] *See generally Conoco, Inc. v. Direction, OWCP,* 194 F.3d 684, 33 BRBS 187 (5th Cir. 1999). Claimant is not required to establish that the accident in fact caused her harm. She need only establish that the accident could have caused the harm or aggravated a pre-existing condition. *Champion v. S & M Traylor Bros.*, 690 F.2d 285, 15 BRBS 33(CRT) (D.C. Cir. 1982); *Stevens*, 23 BRBS 191. As the administrative law judge did not make definitive findings of fact with regard to the essential elements of claimant's claim, we must remand the case for him to do so. *See generally Bath Iron Works Corp. v. Preston*, 380 F.3d 597 38 BRBS 60(CRT) (1st Cir. 2004).

If claimant establishes her *prima facie* case, she is entitled to invocation of the Section 20(a) presumption linking her harm to her employment. *Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000); *Gooden v. Director, OWCP,* 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998). If, on remand, the administrative law judge determines that, based on the facts of this case, claimant is entitled to invocation, the burden shifts to employer to rebut the presumption with substantial evidence that claimant's conditions were not caused or aggravated by her employment. *See Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir.), *cert. denied*, 540 U.S. 1056 (2003). If the administrative law judge determines that employer has established rebuttal, he must weigh all of the evidence and resolve the causation issue based on the record as a whole, with claimant bearing the burden of persuasion. *See Sistrunk v. Ingalls Shipbuilding, Inc.*, 35 BRBS 171 (2001); *see also Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT).

We next address claimant's contention that the administrative law judge erred in denying disability benefits in the event that he finds on remand that claimant sustained any work-related injuries.[8] The administrative law judge found that claimant reached

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[7] If a pre-existing condition is aggravated by a work accident, the entire resultant condition is compensable. *See Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (*en banc*); *see also J.V. Vozzolo, Inc. v. Britton,* 377 F.2d 144, 147-148 (D.C. Cir. 1967) ("employers accept with their employees the frailties that predispose them to bodily hurt"); *Vandenberg v. Leicht Material Handling Co.*, 11 BRBS 164 (1979).

[8] A finding of causation would also entitle claimant to reasonable and necessary medical expenses. *See* 33 U.S.C. §907.

maximum medical improvement with regard to her neck, back, and right hand injuries on August 8, 2002, and that she is able to return to her former employment with no residual disability. Decision and Order at 16.

While claimant does not directly contest the administrative law judge's finding that August 8, 2002, is the date of maximum medical improvement for all of her conditions, she argues that she remained temporarily totally disabled until August 28, 2003, the date Dr. Watermeier, her treating physician, released her to return to work with restrictions, and that she sustained a loss in wage-earning capacity thereafter. In determining August 8, 2002, to be the date of maximum medical improvement, the administrative law judge relied upon the opinion of Dr. Steiner, who stated that claimant could return to work with no restrictions as of his examination on that date. EX 4 at 15-16. In so doing the administrative law judge discounted the opinion of Dr. Watermeier who established restrictions on claimant's activities because Dr. Watermeier conceded that such restrictions were based solely upon claimant's subjective complaints and had no objective basis.[9] CX 1 at 22. The administrative law judge further relied upon the opinion of Dr. Montz who also found no objective evidence of disability, EX 3 at 17, as of the date of his examination on February 18, 2003, and the physical therapy reports which suggest that claimant may have reached maximum medical improvement in the fall of 2000. EX 7.

Claimant has not raised any error in the administrative law judge's weighing of the evidence as it relates to his finding that claimant reached maximum medical improvement as of August 8, 2002, and suffered no physical impediment to her return to her usual work after that date. The administrative law judge's finding is supported by the medical evidence and the weighing of the evidence is with his discretion. *See Gulf Best Electric, Inc. v. Methe*, 396 F.3d 601, 38 BRBS 99(CRT) (5th Cir. 2004); *Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991).

However, the administrative law judge failed to address whether claimant sustained any work-related disability prior to August 8, 2002, an issue on which claimant bears the burden of proof. *See generally Gacki v. Sea-Land Service, Inc.*, 33 BRBS 127 (1998). For example, the administrative law judge did not address whether claimant sustained a period of disability after her carpal tunnel surgery, or the physicians'

[9] The administrative law judge specifically found that there were serious doubts as to claimant's credibility, and this finding is within his discretion. Decision and Order at 11; *see Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979).

statements that if claimant suffered a work injury to her neck and back there would have been some period of disability which should have resolved in approximately six to twelve weeks following the incident. EX 3. Therefore, on remand, if the administrative law judge finds that claimant suffered a work-related injury to her neck, back, or right hand, he must address the issue of disability prior to August 8, 2002.

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

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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BETTY JEAN HALL
Administrative Appeals Judge