



BRB No. 14-0362

ROSEMARY CAPUANO	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NAVY EXCHANGE SERVICE	)	DATE ISSUED: <u>July 23, 2015</u>
COMMAND	)	
	)	
and	)	
	)	
ABERCROMBIE, SIMMONS	)	
& GILLETTE	)	
	)	
Self-Insured Employer/	)	
Administrator-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Jennifer Gee, Administrative Law Judge, United States Department of Labor.

Robert W. Nizich (Law Offices of Robert W. Nizich), San Pedro, California, for claimant.

Arthur A. Leonard (Aleccia & Mitani), Long Beach, California, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Awarding Benefits (2012-LHC-01967) of Administrative Law Judge Jennifer Gee 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.*, as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *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. 33 U.S.C. §921(b)(3); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant commenced working for employer in 1979, first as a distribution intern, then as an operations manager, and presently as a warehouse supervisor. Claimant's duties throughout her tenure have involved substantial walking. On September 14, 2004, claimant sustained a work injury to her right knee which was diagnosed as a sprain/torn meniscus. She underwent arthroscopic surgery on October 12, 2004, and was released to return to work without restrictions on January 10, 2005. On January 9, 2006, claimant underwent a second arthroscopic procedure on her right knee.

In early May 2006, claimant reported left knee pain to her physician. In January 2008, she sustained a work-related left knee injury; on July 22, 2008, she underwent arthroscopic surgery on her left knee. On July 28, 2009, a second arthroscopic procedure was performed on claimant's left knee. On August 17, 2009, claimant was released to modified-duty work.

Claimant testified that her left knee condition worsened and that, sometime prior to May 11, 2010, she informed employer that she intended to undergo additional surgery on her left knee. Tr. at 32, 46. On May 11, 2010, claimant underwent left total knee replacement surgery. Claimant was released to return to modified work on June 21, 2010; she subsequently underwent right knee replacement surgery on September 14, 2010.

On September 20, 2010, claimant filed two claims for benefits under the Act, seeking disability and medical benefits for her two knee replacements. In her Decision and Order, the administrative law judge found that claimant's claim for disability benefits for her left knee condition is barred by Section 12 of the Act, because claimant did not provide timely notice to employer of that injury pursuant to Section 12(a) and her failure to do so was not excused under Section 12(d). 33 U.S.C. §912(a), (d). After addressing the remaining issues disputed by the parties, the administrative law judge awarded claimant temporary total disability benefits for her right knee injury from September 15 through December 20, 2010, permanent partial disability benefits for a 21 percent permanent partial impairment to her right knee, and medical benefits related to both knee conditions. 33 U.S.C. §§908(b), (c)(2), 907.

On appeal, claimant challenges the administrative law judge's finding that her left knee injury claim is barred pursuant to Section 12 of the Act. Specifically, claimant asserts the administrative law judge erred in finding that she failed to give employer timely notice of her left knee injury; alternatively, claimant argues that the administrative law judge erred in finding that employer was prejudiced by any delay in receiving such notice. Employer, in response, urges affirmance of the administrative law judge's decision.

Section 12 of the Act requires that a claimant must, in a traumatic injury case, give written notice of her injury within 30 days of the injury or of the date she 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 her employment.<sup>1</sup> 33 U.S.C. §912(a); *Abel v. Director, OWCP*, 932 F.2d 819, 24 BRBS 130(CRT) (9<sup>th</sup> Cir. 1991); *Todd Shipyards Corp. v. Allan*, 666 F.2d 399, 14 BRBS 427 (9<sup>th</sup> Cir.), *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 the employer has been given sufficient notice of the injury pursuant to Section 12. *Kashuba v. Legion Ins. Co.*, 139 F.3d 1273, 32 BRBS 62(CRT) (9<sup>th</sup> Cir. 1998), *cert. denied*, 525 U.S. 1102 (1999). “Awareness” in a traumatic injury case occurs when the claimant is aware, or should have been aware, of the relationship between the injury, the employment, and an impairment of her earning power, and not necessarily on the date of the accident, or in this repetitive trauma case, the date of the last trauma. *See Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1<sup>st</sup> Cir. 2004); *J.M. Martinac Shipbuilding v. Director, OWCP*, 900 F.2d 180, 23 BRBS 127(CRT) (9<sup>th</sup> Cir. 1990) (discussing same standard in 33 U.S.C. §913).

In this case, claimant testified she notified employer that she was going to have surgery on her left knee prior to undergoing that surgery on May 11, 2010; specifically, claimant testified that she filled out a “leave chit” with employer prior to May 11, 2010. *See* Tr. at 32, 46. Claimant described this process as:

Anytime you’re out of work or planning an absence, we have a chit, where you have to put your employee names, your dates, your times, and you know, your name. And then have approval from the supervisor.

Tr. at 32. Claimant opined that employer knew of the work-related nature of her surgery because she was always complaining about pain in her legs, but stated that she filed accident reports only following her 2004 and 2008 work incidents. *Id.* at 47. Claimant’s September 20, 2010 LS-203 Claim for Compensation documents the nature of her injury as a “left knee replacement,” and states that the date of her injury, which is described as

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<sup>1</sup> 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 chapter shall be given within thirty days after the date of such injury 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, . . . .

“continuous trauma,” was May 10, 2010. EX 1 at 3; *see also* ALJX 1, Cl. LS-18 Pre-Hearing Statement dated August 8, 2012 (listing three dates of injury: September 14, 2004, May 10, 2010, and September 13, 2010).<sup>2</sup>

The administrative law judge addressed claimant’s testimony regarding her complaints of knee pain and her submission of a “chit” to employer prior to undergoing surgery on May 11, 2010. *See* Decision and Order at 17-18. The administrative law judge implicitly concluded that claimant was “aware” of the work-related nature of her left knee replacement surgery no later than the day the surgery was performed, May 11, 2010. The administrative law judge found that claimant, who had received benefits for her prior work-related injuries in 2004 and 2008, knew the protocol for notifying employer of a work related injury. *Id.* at 19. The administrative law judge concluded that, as claimant’s claim was filed on September 20, 2010, “well after the 30 day notice period had expired,” claimant did not timely give notice to employer of her 2010 left knee injury. *Id.*

Claimant, in challenging the administrative law judge’s finding, contends the administrative law judge erred in failing to specifically address the date on which she became aware that her May 11, 2010, left knee surgery was the result of cumulative work-related trauma.<sup>3</sup> Claimant contends the administrative law judge erroneously assumed that the date of her awareness, and consequently the commencement of the 30-day period for giving employer notice, was the date claimant underwent her surgery and first experienced a wage loss. Rather, claimant asserts that since the only medical opinion of record documenting “cumulative trauma” is dated November 2012, her September 20, 2010 LS-203 Claim for Compensation form merely set forth the “*possibility*” that continuous trauma contributed to her knee condition and that notice was therefore given to employer “*before* the time for it had even begun to run.” *See* Cl. Br. at 20 -21 (emphasis in original). Thus, claimant avers that the administrative law judge’s apparent decision to start the 30-day notice period on the day of her surgery is reversible error. *See id.* at 19-23.

We affirm the administrative law judge’s finding that claimant did not give employer timely notice of her left knee injury pursuant to Section 12(a) of the Act. In her

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<sup>2</sup> The September 14, 2004 and September 13, 2010 dates refer to injuries to claimant’s right knee. The administrative law judge’s award of benefits for the right knee is not challenged on appeal.

<sup>3</sup> A review of the hearing transcript and the parties’ post-hearing briefs reveals that neither party addressed the issue of the date of claimant’s awareness of the work-related nature of her May 11, 2010, left knee surgery.

decision, the administrative law judge rejected the position claimant espouses: that she was unaware of the work-related nature of her left knee condition prior to her May 11, 2010 surgery,<sup>4</sup> but that employer was aware of that connection before the surgery. *See* Decision and Order at 17-19. After reviewing claimant's contentions on appeal, as well as the record developed before, and the pleadings filed with, the administrative law judge, we conclude that claimant has not demonstrated reversible error in the administrative law judge's finding that claimant was aware of the work-related nature of her left knee condition no later than the date of her May 11, 2010 surgery. We therefore reject claimant's contentions of error and affirm the administrative law judge's finding that claimant's notice of injury, given on September 20, 2010, with regard to her left knee condition was untimely filed pursuant to Section 12(a) of the Act.

We next address claimant's challenge to the administrative law judge's finding that employer was prejudiced by her failure to provide timely notice under Section 12(a). A claimant's failure to give her employer timely notice of her injury pursuant to Section 12(a) of the Act is excused if the employer had knowledge of the injury or was not prejudiced by the claimant's failure to give proper notice or if the district director excuses the failure to file on grounds provided by the statute. 33 U.S.C. §912(d). Pursuant to Section 20(b) of the Act, the employer bears the burden of producing substantial evidence that it did not have knowledge of the injury and was prejudiced by the late notice. *Kashuba*, 139 F.3d 1273, 32 BRBS 62(CRT); *Cox v. Brady-Hamilton Stevedore Co.*, 25 BRBS 203 (1991); *Bivens*, 23 BRBS 233. Prejudice under Section 12(d)(2) may be established where the employer provides substantial evidence that due to the claimant's failure to provide timely written notice, it was unable to effectively investigate to determine the nature and extent of the illness or to provide medical services. *Kashuba*, 139 F.3d 1273, 32 BRBS 62(CRT); *Bustillo v. Southwest Marine, Inc.*, 33 BRBS 15 (1999). A conclusory allegation of prejudice is insufficient to meet the employer's burden of proof. *Id.*; *see also Jones Stevedoring Co. v. Director, OWCP [Taylor]*, 133 F.3d 683, 31 BRBS 178(CRT) (9<sup>th</sup> Cir. 1997).

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<sup>4</sup> Claimant's assertion that, as she was not informed by a physician of the work-related nature of her left knee condition until after her surgery, her date of awareness must be after May 11, 2010, is based on a faulty premise. The Board has held that, in determining the date of awareness, the date on which a claimant is informed by a doctor of the relationship between her work and her injury is significant, but not always controlling, especially where there is other evidence that the claimant was aware of the relationship at an earlier date. *V. M. [Morgan] v. Cascade General, Inc.*, 42 BRBS 48 (2008), *aff'd mem.*, 388 F.App'x 695 (9<sup>th</sup> Cir. 2010); *Wendler v. American Nat'l Red Cross*, 23 BRBS 408 (1990); *see also Ceres Gulf, Inc. v. Director, OWCP [Fagan]*, 111 F.3d 17, 31 BRBS 21(CRT) (5<sup>th</sup> Cir. 1997) (date of awareness cannot post-date the date the claimant completed a claim for compensation, even though he never filed it).

In this case, the administrative law judge found that employer suffered prejudice due to the claimant's untimely notice of her left knee injury. The administrative law judge stated:

I find that the Employer was prejudiced by the [claimant's] late notification. The Employer did not have any opportunity to investigate whether the total left knee replacement was necessary or whether the Claimant's left knee injury was work related to begin with. By the time the Employer knew about the left knee claim, the Claimant's left knee had healed almost completely from surgery and she was recovering for [sic] her right total knee replacement.

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I find that the Claimant did not afford the Employer timely notice of her left knee injury and that the late notice prejudiced the Employer by preventing it from having an opportunity to investigate the injury. Therefore, the Claimant is barred from any compensation for her left knee injury.

Decision and Order at 19.

In challenging the administrative law judge's finding on this issue, claimant contends employer did not present substantial evidence that it was in any respect prejudiced by the untimeliness of claimant's notice. We agree with claimant. At the formal hearing, employer did not allege that it was prejudiced by claimant's late notice of injury, nor did it elicit any testimony on this issue. In its post-hearing brief, employer stated only that it had been denied the "opportunity for any investigation prior to Claimant's surgery" because, by the time it received notice, "Claimant had already had her surgery." Emp. Post-hearing Br. at 12. Moreover, while employer continues to assert that it was unable to timely investigate claimant's medical care, employer has not alleged that claimant's May 11, 2010, total left knee replacement surgery was unreasonable or unnecessary. *See id.* at 11-12; Emp. Resp. Br. at 12-18.

The facts of this case are indistinguishable from those in *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9<sup>th</sup> Cir. 2010). In *Ogawa*, the administrative law judge found that the claimant had not provided his employer notice of his work injury, but that this late notice was excused because the employer was not prejudiced as a result of it. The United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, affirmed this finding, stating:

instead of providing any concrete example of how its investigation was prejudiced by the [claimant's] late notice, Hawaii Stevedores relies on a bare assumption that an immediate medical exam might have provided more or different information about Ogawa's recovery. Such speculative and conjectural theory or prejudice, however, is insufficient as a matter of law.

608 F.3d at 649, 44 BRBS at 49(CRT). Like the employer in *Ogawa*, employer in this case has not supported its generalized assertion of prejudice with any evidence. Moreover, after it received notice in September 2010, employer issued an investigative report dated November 24, 2010, which states that “[c]ompensability is not an issue as the accident occurred within the course and scope of the claimant’s employment.” CX 30 at EX A, p. 12. Therefore, as employer has presented merely “a speculative and conjectural theory of prejudice,” *Ogawa*, 608 F.3d at 649, 44 BRBS at 49(CRT), as a matter of law employer has not established it was prejudiced by claimant’s late notice of injury. *Id.* We, therefore, reverse the administrative law judge’s finding that employer was prejudiced by claimant’s late-filed notice of injury. See *Boyd v. Ceres Terminals*, 30 BRBS 218 (1997); *Steed v. Container Stevedoring Co.*, 25 BRBS 210 (1991). Consequently, we reverse the finding that the claim for disability benefits for claimant’s left knee condition is barred pursuant to Section 12.

Accordingly, we affirm the administrative law judge's finding that claimant did not give employer timely notice of her left knee injury. We reverse, however, the administrative law judge's finding that employer was prejudiced by that untimely notice and the consequent finding that claimant's claim for benefits for disability resulting from her left knee condition is barred pursuant to Section 12. The case is remanded to the administrative law judge for resolution of any remaining issues concerning claimant's left knee injury. In all other respects, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge

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RYAN GILLIGAN  
Administrative Appeals Judge