BRB No. 06-0588

BRIAN R. AUSTIN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WEEKS MARINE, INCORPORATED	)	DATE ISSUED: 03/28/2007
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

David C. Barnett (Barnett & Lerner, P.A.), Dania Beach, Florida, for claimant.

Christopher P. Boyd and Bonnie J. Murdoch (Taylor, Day, Currie, Boyd & Johnson), Jacksonville, Florida, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (2004-LDA-00660) of Administrative Law Judge Ralph A. Romano 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 was hired by employer in August 2001 as a project manager. He was assigned in September 2001 to work on a beach renourishment project in Strathmere, New Jersey. After the attacks on the World Trade Center (WTC) on September 11, 2001, claimant asserted that he was transferred by employer at his request to assist in the loading of debris from the WTC site onto barges, and that he returned to the Strathmere project after a couple of weeks. Claimant quit working for employer in January 2002. Claimant alleged that he sustained a psychiatric injury arising from his employment at the WTC site, and that he is entitled to compensation for temporary total disability commencing in April 2002. Tr. at 15. Employer controverted the claim, contending that the alleged injury is not within the Act's coverage, 33 U.S.C. §§902(3), 903(a), that claimant failed to provide timely notice of the injury or to timely file his claim, 33 U.S.C. §§912, 913, that an employee-employer relationship did not exist at any time claimant may have been in the area of the WTC, and that claimant's psychological condition is not related to his employment.

In his decision, the administrative law judge noted claimant's testimony that he began experiencing physical symptoms while working at the WTC, including a runny nose, sinus problems and vomiting, and that, psychologically, he felt like a "machine" without feelings. The administrative law judge found that claimant should have been aware in September 2001 of the relationship between his physical and psychological symptoms and the work he allegedly performed for employer at the WTC. The administrative law judge found that when claimant quit working for employer in January 2002 his psychological condition had deteriorated to the point that he should have been aware his injury would affect his wage-earning capacity. The administrative law judge thus found that claimant was required to give employer notice of his alleged work injury within 30 days of the date he terminated his employment with employer. *See* 33 U.S.C. §912(a). The administrative law judge therefore found that claimant's filing formal notice of his claim on February 10, 2003, was untimely, pursuant to Section 12 of the Act. The administrative law judge next found that employer did not have knowledge of claimant's injury within the filing period, and was prejudiced by claimant's untimely notice. *See* 33 U.S.C. §912(d)(1), (2). The administrative law judge found that employer was not adequately able to defend the claim due to its inability to locate and interview witnesses and to have claimant's psychological injury evaluated in a timely manner. Accordingly, the administrative law judge denied the claim as time-barred pursuant to Section 12.

On appeal, claimant challenges the administrative law judge's findings that he did not timely notify employer of his injury, and that employer was prejudiced by its not receiving notice until February 10, 2003. Claimant also asserts that the administrative law judge erred by not addressing whether the claim comes within the coverage provisions of the Act, whether claimant's psychological condition is related to his employment at the WTC site and whether there was an employee-employer relationship

at the time of the injury. Employer responds, urging affirmance of the administrative law judge's denial of the claim.

Claimant contends that the administrative law judge erred in finding that he did not give employer timely notice of his psychological condition pursuant to Section 12(a). Claimant asserts the administrative law judge erred by applying an "ordinary person" standard to find that he should have been aware of the relationship between his injury and his employment in January 2002. Claimant argues that he was first aware of this relationship after he commenced medical treatment for his psychological condition in February 2003.[1]

Section 12(a) of the Act requires that claimant must, in a traumatic injury case, give employer written notice of his injury within 30 days of the injury or of the date claimant 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 his employment.[2] *Todd Shipyards Corp. v. Allan*, 666 F.2d 399, 14 BRBS 427 (9th 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 employer has been given sufficient notice of the injury pursuant to Section 12(a). *See Lucas v. Louisiana Ins. Guaranty Ass'n*, 28 BRBS 1 (1994). "Awareness" for purposes of Section 12 in a traumatic injury case occurs when claimant is aware, or should have been aware, of the relationship between his injury, employment, and disability, and not necessarily on the date of the accident. *See, e.g., Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38

[1] We decline to address for the first time on appeal claimant's contention that the one-year limitations period for providing notice in occupational disease cases is applicable. *Boyd v. Ceres Marine Terminals*, 30 BRBS 218 (1997); *see* 33 U.S.C §912(a). In his decision, the administrative law judge found that neither claimant nor employer asserted that claimant's psychological condition is an occupational disease. Decision and Order at 4.

[2] 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 . . .

BRBS 60(CRT) (1st Cir. 2004); *see Ceres Gulf, Inc. v. Director, OWCP [Fagan]*, 111 F.3d 17, 31 BRBS 21(CRT) (5th Cir. 1997); *Bath Iron Works Corp. v. Galen*, 605 F.2d 583, 10 BRBS 863 (1st Cir. 1979).

The administrative law judge credited claimant's testimony that he had no physical or emotional health problems prior to September 11, 2001. EX MM at 52. The administrative law judge found that an "ordinary person" in good health would attribute his psychological and pulmonary symptoms and vomiting while working at the WTC site to the harsh and stressful working conditions there. Decision and Order at 4. The administrative law judge further found that a reasonable person would associate claimant's psychological reaction at the WTC of feeling like "a machine," CX P at 15, as a reaction to an extraordinarily tense situation. The administrative law judge found that claimant's psychological state had deteriorated by January 2002 to the extent that he was unable to leave his home, he was forced to go to the hospital more than once due to his physical symptoms, and he became unable to work. EX LL at 151-157. The administrative law judge found that claimant, therefore, should have been aware by January 2002 of the work-relatedness of a disability due to his psychological condition. Decision and Order at 4-5. The administrative law judge found claimant's assertion that he was unaware that his condition was work-related until he began treatment in February 2003 contradicted by the deposition testimony of his treating psychiatrist, Dr. Pinto, and his treating psychologist, Dr. Thompson.[3] Based on this evidence, the administrative law judge concluded that claimant was required under Section 12(a) to notify employer of his injury within 30 days after he quit working for employer in January 2002, since claimant should have been aware of the relationship between the injury and his employment at this time. Decision and Order at 5. The administrative law judge found that since claimant did not provide notice of his injury to employer until he filed his claim on February 10, 2003, claimant's notice was untimely.

We affirm the administrative law judge's finding that claimant should have been aware of the relationship between his psychiatric injury, his employment, and his disability when he quit working for employer in January 2002 as it is rational and supported by substantial evidence. Claimant's awareness of the work-relatedness of his injury can arise prior to his being so informed by a physician. *Fagan*, 111 F.3d 17, 31 BRBS 21(CRT); *Wendler v. American National Red Cross*, 23 BRBS 408 (1990) (McGranery, J., concurring and dissenting); *Pryor v. James McHugh Constr. Co.*, 18

[3] Dr. Pinto testified at his deposition that his impression from talking to claimant is that claimant realized he had been affected by his employment at the WTC site. CX O at 80. Dr. Thompson agreed at his deposition with employer's counsel that claimant had attributed his mechanical behavior and nausea at the WTC site to his employment there. CX P at 48-49.

BRBS 273 (1986); *see also Fulks v. Avondale Shipyards, Inc.*, 637 F.2d 1008, 12 BRBS 975 (5th Cir.), *cert. denied*, 454 U.S. 1080 (1981). In this case, the administrative law judge rationally credited claimant's testimony and the deposition testimony of Drs. Pinto and Thompson to find that claimant was aware that his psychological injury was related to the employment conditions at the WTC site. Moreover, the administrative law judge rationally credited claimant's deposition testimony to find that claimant's psychological state had deteriorated by January 2002 to the extent that he quit working for employer, he was unable to leave his home, and he was forced to go to the hospital more than once due to his physical symptoms. The proper test for determining claimant's date of awareness is not subjective but objective. *Sun Shipbuilding & Dry Dock Co. v. McCabe*, 593 F.2d 234 (3d Cir. 1979). Accordingly, the administrative law judge did not apply an erroneous legal standard in finding that an ordinary person in good health would attribute one's psychological and pulmonary symptoms and vomiting at the WTC to the harsh and stressful working conditions there. Thus, we affirm the administrative law judge's conclusion that claimant's notice to employer when he filed his claim on February 10, 2003, was untimely pursuant to Section 12(a).

Claimant, however, argues that the administrative law judge erred in finding that his alleged lack of written notice under Section 12(a) was not excused by Section 12(d). Specifically, claimant maintains there is no evidence supporting the administrative law judge's conclusion that employer was prejudiced by not receiving notice of claimant's injury until February 2003 because it was unable to locate witnesses and obtain testimony.

Section 12(d) of the Act, 33 U.S.C. §912(d), provides 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]. . . .

Because Section 12(d) is written in the disjunctive, claimant's failure to file a notice of injury will not bar a claim if any of three bases is met: employer had actual knowledge of the injury, employer was not prejudiced by the failure to give formal notice, or the district director excused the failure to file.[4] *See Boyd v. Ceres Terminals*, 30 BRBS 218 (1997); *Sheek v. General Dynamics Corp.*, 18 BRBS 151 (1986), *modifying on recon.*, 18 BRBS

[4] Claimant does not challenge the administrative law judge's finding that Sections 12(d)(1) and (3) are inapplicable to this case. 33 U.S.C. §912(d)(1), (3).

1 (1985). Pursuant to Section 20(b), employer bears the burden of producing substantial evidence that none of these bases applies. *Shaller v. Cramp Shipbuilding & Dry Dock Co.*, 23 BRBS 140 (1989); *Forlong v. American Security & Trust Co.*, 21 BRBS 155 (1988). Prejudice under Section 12(d)(2) may be established where employer provides substantial evidence that due to claimant's failure to provide timely written notice, it was unable to effectively investigate the injury to determine the nature and extent of the illness or to provide medical services. A conclusory allegation of prejudice or of an inability to investigate the claim when it is fresh is insufficient to meet employer's burden of proof. *See Jones Stevedoring Co. v. Director, OWCP [Taylor]*, 133 F.3d 683, 31 BRBS 178(CRT) (9th Cir. 1997); *ITO Corp. v. Director, OWCP*, 883 F.2d 422, 22 BRBS 126(CRT) (5th Cir. 1989); *Bustillo v. Southwest Marine, Inc.*, 33 BRBS 15 (1999).

The administrative law judge found that employer was not able to defend the claim adequately because many individuals with knowledge of the facts and circumstances surrounding the claim were no longer working for employer. Decision and Order at 6. The administrative law judge found that employer's ability to immediately locate and identify witnesses is crucial to mounting a defense because much of the claim is dependent on whether claimant was actually assigned to work at the WTC. The administrative law judge also found that employer was prejudiced by being unable to have its medical experts examine claimant and evaluate his injuries in a timely manner. Thus, the administrative law judge concluded that claimant's untimely notice cannot be excused under Section 12(d)(2).

We cannot affirm the administrative law judge's finding that employer was prejudiced by the untimely written notice of injury, as he did not cite any specific evidence supporting his conclusion that employer was actually prejudiced because it was not able to locate and interview witnesses. *See generally Gremillion v. Gulf Coast Catering Co.*, 31 BRBS 163 (1997) (Brown, J., concurring); 5 U.S.C. §557(c)(3)(A). We note that employer bears the burden of showing that it was prejudiced by the untimely notice and a conclusory allegation of prejudice or of an inability to investigate the claim when it was fresh is insufficient.[5] *See Kashuba v. Legion Ins. Co.*, 139 F.3d 1273, 32 BRBS 62(CRT) (9th Cir.1998), *cert. denied*, 525 U.S. 1102 (1999). In this regard, the relevant time period in which employer must demonstrate prejudice is the time between claimant's date of awareness in January 2002, as this date triggered the obligation to provide notice, and the date formal notice was given in February 2003. Claimant argues that employer made no effort to identify potential witnesses until immediately prior to the formal hearing on October 5 and 6, 2005. The record shows that employer submitted into evidence the deposition testimony of Christopher Devlin and Obis Wohl, who worked for

[5] Thus, it is immaterial that claimant made no argument that this provision applies, contrary to the administrative law judge's statement.

employer at the WTC. They testified that employer first contacted them to testify in September 2005.[6] EXs PP at 38-39; QQ at 38-39. Because the administrative law judge's finding that employer was prejudiced by claimant's untimely notice is not supported by substantial evidence of record, we vacate the administrative law judge's dismissal of the claim. We remand the case to the administrative law judge to fully address the evidence of record concerning any prejudice to employer that ensued due to claimant's untimely notice of injury.

Employer, in its response brief, asserts that the filing of the claim on February 10, 2003, is untimely, pursuant to Section 13 of the Act. 33 U.S.C. §913. Employer's Response Brief at 35 n. 19. We will address employer's assertion inasmuch as it supports the administrative law judge's denial of the claim. *See Farrell v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 283, *modifying on recon.*, 32 BRBS 118 (1998); *Dalle Tezze v. Director, OWCP*, 814 F.2d 129, 10 BLR 2-62 (3d Cir. 1987). Section 13(a) provides that a claimant must, in a traumatic injury case, file a claim for compensation for his injury within one year after he 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 his employment.[7] *Alexander v. Avondale Industries, Inc.*, 36 BRBS 142 (2002); *Hodges v. Caliper, Inc.*, 36 BRBS 73 (2002). 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 filing of the claim was timely. *Bath Iron Works Corp. v. U. S. Dep't of Labor [Knight]*, 336 F.3d 51, 37 BRBS 67(CRT) (1st Cir. 2003); *Steed v.*

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[6] Moreover, we note that the record evidence indicates that employer first had claimant examined by a medical expert, Dr. Powell, a pulmonologist, on August 18, 2004, and by Dr. Cooley, a psychiatrist on September 23, 2004, more than 18 months after claimant gave notice of his injury. EXs HH at 14, JJ at 8.

[7] Section 13(a), 33 U.S.C. §913(a), states:

> Except as otherwise provided in this section, the right to compensation for disability or death under this chapter shall be barred unless a claim therefore [sic] is filed within one year after the injury or death. If payment of compensation has been made without an award on account of such injury or death, a claim may be filed within one year after the date of the last payment. Such claim shall be filed with the deputy commissioner in the compensation district in which such injury or death occurred. The time for filing a claim shall not begin to run until the employee or beneficiary is aware, or by the exercise of reasonable diligence should have been aware, of the relationship between the injury or death and the employment.

Container Stevedoring Co., 25 BRBS 210 (1991). "Awareness" for purposes of Section 13 in a traumatic injury case occurs when claimant is aware, or should have been aware, of the relationship between the injury, the employment, and the disability, and not necessarily on the date of the accident. *Newport News Shipbuilding & Dry Dock Co. v. Parker*, 935 F.2d 20, 24 BRBS 98(CRT) (4th Cir. 1991); *accord Paducah Marine Ways v. Thompson*, 82 F.3d 130, 30 BRBS 33(CRT) (6th Cir. 1996); *Duluth, Missabe & Iron Range Ry. Co. v. Heskin*, 43 F.3d 1206 (8th Cir. 1994); *Abel v. Director, OWCP*, 932 F.2d 819, 24 BRBS 130(CRT) (9th Cir. 1991)*; Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22(CRT) (11th Cir. 1990)*; Marathon Oil Co. v. Lunsford*, 733 F.2d 1139, 16 BRBS 100(CRT) (5th Cir. 1984). Thus, the "awareness" provisions of Sections 12 and 13 are identical.

As we have affirmed the administrative law judge's finding that claimant should have been aware of the relationship between his psychiatric injury, his employment and his disability when he quit working for employer in January 2002, claimant's filing of his claim on February 10, 2003, may also be untimely, pursuant to Section 13(a). If the administrative law judge determines on remand that employer was not prejudiced by claimant's untimely notice, he should address whether employer rebutted the Section 20(b) presumption that the claim was timely filed. In order to rebut the Section 20(b) presumption, employer must establish that it complied with the requirements of Section 30(a) of the Act, 33 U.S.C. §930(a). *See Bustillo*, 33 BRBS 15. Section 30(a) provides in pertinent part:

> Within ten days from the date of any injury which causes loss of one or more shifts of work, or death or from the date that the employer has knowledge of a disease or infection in respect of such injury, the employer shall send to the Secretary a report setting forth (1) the name, address, and business of the employer; (2) the name, address, and occupation of the employee; (3) the cause and nature of the injury or death; (4) the year, month, day, and hour when and the particular locality where the injury or death occurred; and (5) such other information as the Secretary may require.

33 U.S.C. §930(a); *see also* 20 C.F.R. §§702.201-205. Section 30(f), 33 U.S.C. §930(f), provides that where employer has been given notice or has knowledge of any injury and fails to file the Section 30(a) report, the statute of limitations provided in Section 13(a) does not begin to run until such report has been filed.[8] *Blanding v. Director, OWCP*, 186

[8] Section 30(f) states:

F.3d 232, 33 BRBS 114(CRT) (2d Cir. 1999); *Ryan v. Alaska Constructors, Inc.*, 24 BRBS 65 (1990). Thus, for Section 30(a) to apply, the employer or its agent must have notice of the injury or knowledge of the injury and its work-relatedness; the employer may overcome the Section 20(b) presumption by proving it never gained knowledge or received notice of the injury for Section 30 purposes. *See Bustillo*, 33 BRBS 15; *see also Stark v. Washington Star Co.*, 833 F.2d 1025, 20 BRBS 40(CRT) (D.C. Cir. 1987). 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; in this regard, the knowledge component may be read in conjunction with Section 12(d)(1). *See Steed*, 25 BRBS 210; *Kulick v. Continental Baking Corp.*, 19 BRBS 115 (1986). The administrative law judge discussed briefly at Section 12(d)(1) the testimony of claimant's mother, Suzanne Romanoff, that she called employer in January 2003 and notified a representative of claimant's condition. Decision and Order at 3; *see* Tr. at 40-42. Moreover, the record establishes that employer filed an LS-207, Notice of Controversion on February 11, 2003. EX RR. Therefore, on remand, the administrative law judge must address this evidence in order to determine whether claimant's claim was timely filed pursuant to Sections 13(a) and 30(a), (f).

Finally, we agree with claimant that the administrative law judge erred by not addressing the other issues raised by the parties, including whether the claim comes within the coverage provisions of the Act, whether an employee-employer relationship existed, and whether claimant established that his condition is work-related. The right to medical benefits for a work-related injury is never time-barred. *See, e.g., Siler v. Dillingham Ship Repair*, 28 BRBS 38 (1994) (decision on recon. *en banc*). Claimant raised his entitlement to medical benefits at the formal hearing. Tr. at 6-7. Accordingly, the administrative law judge erred by not addressing the issues necessary to resolve whether claimant is entitled to medical benefits under the Act. 33 U.S.C. §907(a).

> Where the employer or the carrier has been given notice, or the employer (or his agent in charge of the business in the place where the injury occurred) or the carrier has knowledge, of any injury or death of any employee and fails, neglects, or refuses to file report thereof as required by the provisions of subdivision (a) of this section, the limitations in subdivision (a) of section 913 of this title shall not begin to run against the claim of the injured employee or his dependents entitled to compensation, or in favor of either the employer or the carrier, until such report shall have been furnished as required by the provisions of subdivision (a) of this section.

Accordingly, the administrative law judge's denial of disability compensation is vacated. The case is remanded for the administrative law judge to address the Sections 12(d)(2) and 13(a) issues consistent with this decision. The administrative law judge also must address any issues necessary to resolve claimant's claim for medical benefits for his psychological condition.

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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REGINA C. McGRANERY
Administrative Appeals Judge