BRB No. 04-0177

ALVIN REESE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NORTHROP GRUMMAN SHIP SYSTEMS, INCORPORATED	)	DATE ISSUED: Oct. 21, 2004
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

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

John D. Gibbons (Gardner, Middlebrooks, Gibbons, Kittrell & Olsen, P.C.), Mobile, Alabama, for claimant.

Donald P. Moore (Franke, Rainey & Salloum, PLLC), Gulfport, Mississippi, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order and Decision on Employer/Carrier's Motion for Reconsideration (2003-LHC-0202) 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, an electrician who previously had been compensated for bilateral carpal tunnel syndrome,[1] had returned to work for employer when he began to complain of additional pain in 2002. Following a letter from his treating physician of March 14, 2002, stating that claimant would need light work, claimant was placed on medical leave by employer and never returned to work.[2] On May 10, 2002, claimant filed a form LS-203 claim for compensation, listing injuries to his hands, arms and shoulder. He subsequently claimed an injury to his neck as well.

In his Decision and Order, the administrative law judge rejected employer's argument that claimant's claim is barred pursuant to Section 12 of the Act, 33 U.S.C. §912. The administrative law judge also found that claimant's neck and shoulder injuries, diagnosed as osteoarthritis, arose out of his employment. The administrative law judge found claimant entitled to temporary total disability benefits from March 21, 2002 to April 17, 2002, temporary partial disability benefits from April 17, 2002, until January 28, 2003, and permanent partial disability benefits from January 28, 2003, and continuing based on claimant's residual wage-earning capacity. 33 U.S.C. §908(b), (c)(21), (e). In his Decision on Employer/Carrier's Motion for Reconsideration, the administrative law judge declined to alter his initial determination that claimant's claim is not barred under Section 12 and that claimant cannot return to his usual work.

Employer appeals, contending that the administrative law judge erred in determining claimant's claim for injuries to his shoulder and neck is not barred pursuant to Section 12 and in finding that claimant is incapable of performing his usual job duties. Claimant responds urging affirmance.

Employer first contends that the administrative law judge erred in finding that claimant's claim is not barred due to his failure to file a timely notice of injury pursuant to Section 12 of the Act. The administrative law judge found that claimant was aware that his neck and shoulder pain was related to his employment by March 22, 2002, but that claimant did not give notice of his shoulder injury until his May 10, 2002, filing of his claim. Nonetheless, the administrative law judge found that employer should have

[1] Claimant experienced problems with his hands from 1998 to 2000. Employer paid temporary total disability benefits for claimant's carpal tunnel syndrome, as well as scheduled permanent partial disability benefits for a three percent impairment of claimant's left wrist and a five percent impairment of the right wrist.

[2] Claimant was terminated on July 21, 2002.

been aware of claimant's injuries on March 21, 2002, and that, moreover, employer was not prejudiced by claimant's late formal notice of injury. Decision and Order at 11-12; Decision on Recon. at 2-3. Employer contends that these findings are not supported by substantial evidence.

Pursuant to Section 12(a) of the Act, in a traumatic injury case claimant must give employer written notice of his injury within 30 days of the injury or of the date claimant is aware or should have been aware of the relationship between his injury and employment. 33 U.S.C. §912(a); *see, e.g., Jones Stevedoring Co. v. Director, OWCP*, 133 F.3d 683, 31 BRBS 178(CRT) (9th Cir. 1997); *Bivens v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 233 (1990). 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 … .

Because Section 12(d) is written in the disjunctive, claimant's failure to timely file a notice of injury will not bar a claim if any of the 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. *See Boyd v. Ceres Terminals*, 30 BRBS 218 (1997); *Sheek v. General Dynamics Corp.*, 18 BRBS 151 (1986), *modifying on recon.* 18 BRBS 1 (1985). Pursuant to Section 20(b), 33 U.S.C. §920(b), claimant's notice of injury is presumed to be timely. *Shaller v. Cramp Shipbuilding & Dry Dock Co.*, 23 BRBS 140 (1989). Thus, employer bears the burden of establishing with substantial evidence that it did not have knowledge of the injury and that it was prejudiced by claimant's untimely notice. *I.T.O. Corp. v. Director, OWCP*, 883 F.2d 422, 22 BRBS 126(CRT) (5th Cir. 1989).

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. *Boyd*, 30 BRBS 218; *Bukovi v. Albina Engine/Dillingham*, 22 BRBS 97 (1988). The administrative law judge addressed employer's contention that it was prejudiced, finding employer's allegation unconvincing in light of the fact that claimant was examined on March 21, 2002, in employer's own hospital, at which time claimant complained of work-related pain in his shoulder and arms. CX 8. Thus, the administrative law judge found that employer had an opportunity to perform its own examination of claimant. Moreover, the administrative law judge found that claimant did not undergo any treatment for his neck and shoulder until July

2002, after employer had been notified of the injury, and that employer had sufficient time to investigate claimant's working conditions and to interview his colleagues at work.

As the administrative law judge properly found, a conclusory allegation of prejudice or of an inability to investigate the claim when it is fresh is insufficient to meet employer's burden pursuant to Section 12(d)(2). *See Jones Stevedoring Co.*, 133 F.3d 683, 31 BRBS 178(CRT); *I.T.O. Corp.*, 883 F.2d 422, 22 BRBS 126(CRT); *Bustillo v. Southwest Marine, Inc.*, 33 BRBS 15 (1999). Employer presented no specific evidence establishing prejudice since it was fully aware of claimant's working conditions and had access to both his medical records and his work colleagues. *Cf. Kashuba v. Legion Ins. Co.*, 139 F.3d 1273, 32 BRBS 62(CRT) (9th Cir. 1998), *cert. denied*, 525 U.S. 1102 (1999) (prejudice established where claimant underwent surgery before employer was notified of the injury). Because the administrative law judge rationally found that employer failed to carry its burden of establishing prejudice, we affirm the administrative law judge's finding that claimant's failure to notify it in a timely matter does not bar his claim for injuries to his neck and shoulder.[3] The administrative law judge's conclusion that the claim is not barred by operation of Section 12(a) is therefore affirmed.

Employer next appeals the administrative law judge's finding that claimant is unable to return to his usual job duties as a result of his neck and shoulder pain. Employer contends that any restrictions on claimant's ability to work are due to claimant's wrist and hand complaints, for which, employer contends, claimant is not entitled to any additional compensation. Claimant has the burden of establishing the nature and extent of his disability by initially establishing his inability to perform his usual work due to the injury. *Gacki v. Sea-Land Service, Inc.*, 33 BRBS 127 (1998); *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56 (1985). If the claimant meets his burden, then employer has the burden of coming forth with evidence of the availability of suitable alternate employment, thereby establishing that the claimant's disability is, at most, partial. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). In this case, the administrative law judge found that employer established the availability of suitable alternate employment as of April 17, 2002, and he awarded claimant partial disability benefits thereafter based on his loss in wage-earning capacity, 33 U.S.C. §908(c)(21), (e), as well as a period of temporary total disability from March 21, 2002, to the date of suitable alternate employment. Employer, however, contends that claimant's ability to work is restricted due to his carpal tunnel syndrome and that he is therefore limited to the scheduled permanent partial disability benefits which it has already paid.

[3] Therefore, we need not address the administrative law judge's finding that employer had knowledge of the injury under Section 12(d)(1).

In determining that claimant established that he was disabled due to all of his work-related conditions, the administrative law judge acknowledged that claimant's treating physician, Dr. Barbour, opined that claimant's neck and shoulder injuries did not warrant additional physical restrictions or limitations over those imposed following claimant's carpal tunnel injuries. CX 9 at 18. In March 2002, however, Dr. Barbour wrote employer regarding claimant's need for light-duty work due to pain in his hands when performing strenuous work. At this time, employer placed claimant on medical leave. Tr. at 41. The administrative law judge further found that following treatment for claimant's neck and shoulder pain, Dr. Barbour imposed restrictions in September 2002, as a result of claimant's mild left shoulder impingement and cervical arthritis, as well as the carpal tunnel syndrome. CX 6 at 24 -25.[4] In addition, Dr. Barbour stated that claimant could be limited by his subjective complaints of pain, that his pain is consistent with his injuries, and that the pain is such that it would distract claimant from an adequate performance of daily activities or work. CX 6 at 26; 9 at 18. The administrative law judge found that the restrictions imposed by Dr. Barbour and claimant's pain prevent his return to his usual work. Decision on Recon. at 2.

We reject employer's contention that claimant failed to establish his inability to perform his usual work. A claimant's pain is a valid consideration in assessing the extent of the claimant's disability. *See, e.g., Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Miranda v. Excavation Constr., Inc.*, 13 BRBS 882 (1981). In this case, Dr. Barbour's opinion that claimant had hand pain initially that required reassignment to lighter work, and, subsequently, neck and shoulder pain that could prevent his performing his work, supports the administrative law judge's conclusion that claimant cannot return to his usual employment. *Anderson*, 22 BRBS 20; *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988). Contrary to employer's contention, the fact that claimant's initial period of disability was due to his hand pain does not affect claimant's entitlement to total disability benefits. A claimant whose injury to a scheduled member results in total disability is not limited to a scheduled award. *See Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 277 n.17, 14 BRBS 363, 366 n.17 (1980); *DM & IR Ry. Co. v. Director, OWCP*, 151 F.3d 1120, 32 BRBS 188(CRT) (8th Cir. 1998). Accordingly, as it is supported by substantial evidence, we affirm the administrative law judge's determination that claimant established a *prima facie* case of total disability as of March 21, 2002. *See Padilla v. San Pedro Boat Works*, 34 BRBS 49 (2000). Employer did not establish the availability of suitable alternate employment until April 17, 2002. Therefore, we affirm the award of total disability benefits from March 21 to April 17,

[4] The administrative law judge specifically noted claimant's lifting restrictions permitting frequent lifting up to 10 pounds, occasional lifting up to 25 pounds, and no lifting over 25 pounds. CX 6 at 25.

2002, and the award of compensation for claimant's loss in wage-earning capacity thereafter.

Accordingly, the administrative law judge's Decision and Order and Decision on Employer/Carrier's Motion for Reconsideration are affirmed.

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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JUDITH S. BOGGS
Administrative Appeals Judge