BRB No. 97-314

MILAN J. BROWNE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SOUTHEAST STEVEDORING CORPORATION	)	DATE ISSUED:
	)	
and	)	
	)	
HOMEPORT INSURANCE SERVICES	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
PACIFIC NORTHWEST-ALASKA HEALTH BENEFITS TRUST FUND	)	
	)	
Intervenor	)	DECISION and ORDER

Appeal of the Decision and Order and Order Denying Additional Deposition of Edward C. Burch, Administrative Law Judge, United States Department of Labor.

Michael F. Pozzi , Seattle, Washington, for claimant.

Richard M. Slagle (Williams, Kastner & Gibbs LLP), Seattle, Washington, for employer/carrier.

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

PER CURIAM:

Employer/carrier appeals the Decision and Order and Order Denying Additional Deposition (95-LHC-2307) of Administrative Law Judge Edward C. Burch 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, a dispatcher who assigned longshoremen to perform tie-ups and cast-offs of cruise ships that dock in Ketchikan, Alaska, injured his left hip while working for employer pulling lines on a cruise ship in October 1992. After finding claimant's notice of injury and claim for benefits timely filed in January 1995 under Sections 12 and 13 of the Act, 33 U.S.C. §§912, 913, the administrative law judge awarded claimant temporary total disability benefits from February 8, 1995, the date of claimant's left hip replacement surgery, through April 1, 1995, the date claimant returned to work after surgery. The administrative law judge also awarded claimant and the intervenor medical benefits with interest pursuant to Section 7 of the Act, 33 U.S.C. §907. In a separate Order, the administrative law judge denied employer's request to take the post-hearing deposition of Dr. Grabowski.

On appeal, employer challenges the administrative law judge's findings that claimant's notice of injury and claim for benefits were timely filed under Sections 12 and 13. Employer also contends that the administrative law judge erred in denying employer's request to take the post-hearing deposition of Dr. Grabowski and in failing to determine whether claimant's injury occurred in the course of his employment as a dispatcher for employer. Claimant responds in support of the administrative law judge's award of benefits.

Employer initially contends that the administrative law judge erred in determining that claimant's notice of injury and claim for benefits were timely filed on January 5, 1995, as claimant first reported complaints of his hip to Dr. Davis, a chiropractor, on October 20, 1992. Sections 12 and 13 provide that in cases of traumatic injury, notice of the injury must be given and the claim for benefits filed within 30 days and one year, respectively, after claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice, should have been aware of the relationship between the employment and the injury. 33 U.S.C. §§912, 913; *Abel v. Director, OWCP*, 932 F.2d 819, 24 BRBS 130 (CRT)(9th Cir. 1991). Claimant need not give notice of injury or file a claim for benefits until he is aware that his work-related trauma has caused an impairment of earning power. *J.M. Martinac Shipbuilding v. Director, OWCP*, 900 F.2d 180, 23 BRBS 127 (CRT)(9th Cir. 1990); *Todd Shipyards Corp. v. Allan*, 666 F.2d 399, 14 BRBS 427 (9th Cir.), *cert. denied*, 459 U.S. 1034 (1982); *Welch v. Pennzoil Co.*, 23 BRBS 395 (1990). Under Section 20(b) of the Act, 33 U.S.C. §920(b), there is a presumption that the notice of injury and claim for benefits were timely filed. *Shaller v. Cramp Shipbuilding & Dry Dock Co.*, 23 BRBS 140 (1989).

In determining that claimant's notice of injury and claim for benefits were timely filed in January 1995, the administrative law judge discussed the fact that claimant sought chiropractic treatment with Dr. Davis on October 20, 1992 for work-related hip pain but testified he did not file then because he thought his pain would get better. Decision and Order at 4-5; Tr. at 66. After noting that claimant was able to continue to work full-time until his left hip replacement surgery in February 1995, the administrative law judge concluded that claimant's notice of injury and claim for benefits were timely filed under these circumstances. As the time limitations run from the date of claimant's awareness of the

relationship between the employment, the injury, and the loss in wage-earning capacity, the administrative law judge properly found that claimant's notice of injury and claim for benefits were timely filed. *Newport News Shipbuilding & Dry Dock Co. v. Parker*, 935 F.2d 20, 24 BRBS 98 (CRT) (4th Cir. 1991); *Abel*, 932 F.2d at 819, 24 BRBS at 130 (CRT). Although claimant may have been aware that his injury was work-related in October 1992, when he first sought chiropractic help from Dr. Davis for his hip pain, claimant was not aware that his work-related injury would cause a loss in earning power as he worked full-time until his left hip replacement surgery on February 8, 1995. Consequently, the administrative law judge's finding that the notice of injury and claim for benefits were timely filed is affirmed.[1]

Employer next contends that the administrative law judge erred in denying its request to take the post-hearing deposition of Dr. Grabowski, while granting claimant's request to take the post-hearing deposition of Dr. Lanzer; employer relies upon the holding in *Ramirez v. Southern Stevedores*, 25 BRBS 260 (1992). The administrative law judge has broad discretion concerning the admission of evidence and any decision regarding the exclusion of evidence is reversible only if arbitrary, capricious, or an abuse of discretion. *McCurley v. Kiewest Co.*, 22 BRBS 115 (1989); *Brown v. Bethlehem Steel Corp.*, 19 BRBS 200, *aff'd on recon.*, 20 BRBS 26 (1987), *aff'd and rev'd on other grounds sub nom. Director, OWCP v. Bethlehem Steel Corp.*, 868 F.2d 759, 22 BRBS 47 (CRT)(5th Cir. 1989).

Contrary to employer's contention, the administrative law judge acted within his discretion in denying employer's request for a post-hearing deposition of Dr. Grabowski while granting claimant's request for a post-hearing deposition of Dr. Lanzer, based on the facts of this case. At the end of the hearing on April 2, 1996, claimant's counsel requested

[1]Claimant asserts that his date of awareness was December 20, 1994, the date Dr. Lanzer stated that his left hip pain is work-related, recommended a total replacement of the left hip, and told him that he should not return to work in a heavy labor situation. Cl. Resp. Br. at 10-13; Cl. Ex. 1; Emp. Ex. 3; Tr. at 69, 87. The administrative law judge relies on the date of claimant's left hip surgery on February 8, 1995, after which claimant missed work for two months. Decision and Order at 5; Cl. Ex. 3; Emp. Ex. 5; Tr. at 71-72. Using either claimant's asserted date of awareness or the administrative law judge's finding, the notice of injury and claim for benefits are timely. Employer's argument regarding Section 12(d)(2) therefore is moot.

that he be permitted to take the post-hearing deposition of claimant's treating physician, Dr. Lanzer, the orthopedic surgeon who performed claimant's left hip replacement surgery, to respond to the newly submitted opinion of Dr. Burns, an orthopedic surgeon who performed an examination on claimant for employer on March 13, 1996. Tr. at 117-119. Over employer's objection, the administrative law judge permitted the post-hearing deposition of Dr. Lanzer and limited it to responding to the issue of whether claimant has degenerative arthritis which is work-related as Dr. Lanzer had previously diagnosed, or whether claimant had rheumatoid arthritis which was not work-related as newly diagnosed by Dr. Burns. Tr. at 120-121. After Dr. Lanzer testified that Dr. Grabowski's pathology report did not indicate rheumatoid arthritis but acknowledged that Dr. Grabowski would have more knowledge on this issue than he, employer's counsel requested that employer be allowed to take the post-hearing deposition of Dr. Grabowski, the pathologist who examined claimant's left hip post-operatively. The administrative law judge denied employer's request in a separate Order.

Although employer relies on the holding in *Ramirez* that an administrative law judge abuses his discretion in granting one party's request for a post-hearing deposition while denying the opposing party's like request, this case is factually different from *Ramirez*. In *Ramirez*, employer's request for the post-hearing deposition of a vocational counselor was in response to claimant's request for a doctor's post-hearing deposition based on the results of an MRI taken two weeks before the hearing. As the physical limitations placed on claimant based on the results of the newly submitted results of the MRI affected the jobs that the counselor could find suitable for claimant, the Board held that the administrative law judge abused his discretion in granting claimant's request for the post-hearing deposition of the doctor while denying employer's request for the post-hearing deposition of the counselor. *Ramirez*, 25 BRBS at 264. Unlike *Ramirez*, however, Dr. Lanzer's post-hearing deposition in this case did not rely on newly submitted evidence but was based in part on Dr. Grabowski's pathology report which was in existence for more than one year prior to the hearing and exchanged with employer prior to the hearing. Employer thus had ample opportunity to question Dr. Grabowski concerning his findings.[2] We, therefore, affirm

[2]Employer contends that Dr. Grabowski's pathology report could not rule out rheumatoid arthritis. Dr. Lanzer nonetheless testified that physical activity can adversely affect an arthritic condition even if it is rheumatoid arthritis. Moreover, Dr. Lanzer's diagnosis of degenerative arthritis was based on his physical examination of claimant's left hip at the time of the surgery and x-rays taken just prior to the left hip replacement surgery in addition to Dr. Grabowski's pathology report. Dr. Lanzer's Post-hearing Deposition at 5-10, 27.

the administrative law judge's denial of employer's request to take the post-hearing deposition of Dr. Grabowski as within his discretion based on the facts of this case.

Employer lastly contends that the administrative law judge erred in failing to determine whether claimant's left hip injury occurred in the course of his employment as a dispatcher for employer. Employer contends that pulling lines is not among claimant's job duties. The issue was not raised in employer's amended pre-trial statement, opening argument, or post-hearing brief which served as the closing argument. At the hearing, employer offered evidence pertaining to the issue but the administrative law judge found employer's questioning on this issue irrelevant. Tr. at 90-92. Although employer explained that pulling lines was not required by claimant's job as a dispatcher and it attempted to further question claimant on this issue during the hearing, claimant's counsel objected on relevancy grounds and the objection was sustained by the administrative law judge. Employer at that time did not attempt to make an offer of proof on the course of employment issue. Hence, employer's argument that the administrative law judge interrupted its offer of proof on this issue is specious, as employer did not attempt to further enlighten the administrative law judge regarding its intentions. The administrative law judge therefore did not err in not addressing this issue.

Even if employer had properly raised the issue before the administrative law judge, employer's argument that claimant was not in the course of his employment for employer when he injured his hip pulling lines would be soundly rejected. The issue is not whether pulling lines is in claimant's formal job description, but whether he performed the job. The record reflects that both Mr. Berto and Mr. Geldaker, employer's vice-president and operations manager, respectively, testified they observed claimant over the last 10 years helping out on the lines and neither of them prohibited claimant from performing this activity. Decision and Order at 4; Cl. Exs. 15 at 6-7, 10, 23, 16 at 13-14; Tr. at 112. Pulling lines for ship tie-ups is clearly an activity occurring within the time and space boundaries of claimant's employment and is related, even integral, to the employment. *Mulvaney v. Bethlehem Steel Corp.*, 14 BRBS 593 (1981). Thus, the injury occurred in the course of claimant's employment.

Accordingly, the administrative law judge's Decision and Order awarding benefits, and Order Denying Additional Deposition, are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH

Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge