BRB No. 02-0784

LAWRENCE LEE VINSON	)	
	)	
Claimant-Respondent	)	
	)	
v	)	
	)	
RESOLVE MARINE SERVICES	)	DATE ISSUED: July 11, 2003
	)	
and	)	
	)	
FRENKEL & COMPANY, INCORPORATED	)	
	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Howard L. Silverstein (Silverstein & Silverstein), Miami, Florida, for claimant.

Neil Bayer (Sarnoff & Bayer), Coconut Grove, Florida, for employer/carrier.

Before: SMITH, HALL and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2001-LHC-2898) of Administrative Law Judge Thomas M. Burke 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. *O=Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. '921(b)(3).

Claimant allegedly sustained injuries to his low back and left knee as a result of a fall from a ladder on November 23, 2000, while doing repair work for employer on board the *RTS Manatee*, an eighty-foot single engine tugboat, which was moored at Port Everglades, Broward County, Florida. Claimant has not worked since the accident and alleges that he is unable to work full-time as a result of his injuries. He subsequently filed a claim seeking both disability and medical benefits, which employer controverted.

On August 29, 2001, claimant filed, pursuant to 29 C.F.R. ' 18.42 of the general Rules of Practice and Procedure for the Office of Administrative Law Judges (OALJ Rules), a Motion to Expedite Final Hearing in this case. Employer objected, and following a telephone conference on September 19, 2001, the administrative law judge set the hearing for October 15, 2001. Employer then filed a Motion for Continuance of the hearing on the ground that the offices of its carrier, Frenkel & Company, Incorporated, on the 36th floor of Tower No. 2, were destroyed as a result of the attack on the World Trade Center on September 11, 2001. Employer maintained that all of its carrier=s records, and in particular those relevant to the instant case, were destroyed in that disaster and that it would be unduly prejudiced in attempting to recreate a file, conduct discovery and proceed to trial in this case in only a three week period. A second telephone conference before the administrative law judge followed, Hearing Transcript (HT) at 118; however, the formal hearing took place, as scheduled, on October 15, 2001. At this hearing, both parties submitted evidence, presented witnesses and argued their respective cases, and the record was held open for a period of time thereafter for the submission of depositions and post-hearing briefs. In his July 2002 decision, the administrative law judge awarded claimant temporary total disability benefits from November 23, 2000, as well as all medical expenses attributable to claimant=s work injuries.

On appeal, employer challenges the administrative law judge=s decision to grant claimant=s Motion to Expedite Final Hearing. Employer maintains that under the specific circumstances of this case, the administrative law judge=s decision to hold the hearing on October 15, 2001, was a violation of employer=s procedural due process rights, since it was unable to fully prepare for the hearing and to present the testimony of all necessary witnesses. Employer specifically argues that the pivotal issue in this case was the notice of injury claimant allegedly gave to Mr. Jenne, an employee of its carrier, and that its inability to have Mr. Jenne present at the expedited hearing to refute claimant=s allegation resulted in prejudice since employer was deprived of an opportunity to impeach claimant=s testimony regarding the notification of his injury pursuant to Section 12 of the Act, 33 U.S.C. ' 912. Claimant responds, urging rejection of employer=s contentions.

Due Process

It is well-established that procedural due process requirements are applicable to administrative proceedings. *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Richardson v. Perales*, 402 U.S. 389 (1971). The administrative law judge elected to expedite the hearing in this case after two telephone conferences. At the hearing, the administrative law judge summarized his rationale stating, Athat the rules of the department do provide for a seven-day expedited hearing in cases in which the claimant is not being paid and medical authorization is not forthcoming.@ HT at 118. The provision upon which the administrative law judge purportedly relied, 29 C.F.R. ' 18.42(e), which pertains to notice of a hearing, provides that:

> Following the timely receipt by the administrative law judge of statements in response to the motion [to expedite], the administrative law judge may advance pleading schedules, prehearing conferences, and the hearing, as deemed appropriate: provided, however, that a hearing on the merits shall not be scheduled with less than five (5) working days notice to the parties, unless all parties consent to an earlier hearing.

The administrative law judge=s action on September 19, 2001, in setting the formal hearing for October 15, 2001, and thus in providing the parties 27 calendar days to prepare, complies with the notice requirement provided by the OALJ Rules. However, while the OALJ Rules in Part 29 Aare generally applicable to adjudicatory proceedings before the Office of Administrative Law Judges, United States Department of Labor,@ 29 C.F.R. ' 18.1(a), they do not supercede specific statutory or regulatory provisions enacted for a specific program; thus, A[t]o the extent that these rules may be inconsistent with a rule of special application as provided by statute, executive order, or regulation, the latter is controlling.@ *Id.* The OALJ Rules do not apply to the extent that they are inconsistent with the provisions of the Longshore statute or its regulations. *See e.g., Goicochea v. Wards Cove Packing Co.*, 37 BRBS 4 (2003); *Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78 (1989). We therefore turn our attention to the relevant notification provisions of the Act.

The Act and its implementing regulations differ with regard to the minimum time requirements in which the relevant parties are to receive notice of a hearing. *Compare* 33 U.S.C. ' 919(c) *and* 20 C.F.R. ' 702.335. Section 19(c) of the Act, 33 U.S.C. ' 919(c), states that Aif a hearing on such claim is ordered the [administrative law judge] shall give the claimant and other interested parties at least ten days= notice of such hearing.@ The pertinent regulation, 20 C.F.R. ' 702.335, states that the Aadministrative law judge shall notify the parties (*See* ' 702.333) of the place and time of the formal hearing *not less than 30 days in advance* thereof.@ 20 C.F.R. ' 702.335 (2003) (emphasis added). Consequently, as the Act and its regulations provide specific time limitations, the general regulation at 29 C.F.R. ' 18.42(e), relied upon by the administrative law judge in expediting the formal hearing in this case, does not apply. *See Goicochea*, 37 BRBS 4; *Adams*, 22 BRBS 78.

In this case, the administrative law judge=s decision to provide employer with less than 30 days= notice of the formal hearing does not comply with Section 702.335. We hold, however, that the facts presented, allowing employer less than the time specified by Section 702.335 is insufficient to warrant a conclusion that employer=s right to procedural due process has been abridged. First, the administrative law judge=s decision complies with the time limit of Section 19(c) of the Act. 33 U.S.C. '919(c).[1] Second, and more importantly,

[1] The regulation is not necessarily inconsistent with Section 19(c) of the Act since the Aat least@ language of the Act provides the Department of Labor (DOL) with the authority to set a longer notice period, an action DOL undertook in its 1977 modification of Section 702.335. The implementing regulation originally had a notice provision which mirrored Section 19(c) of the Act, *i.e.*, Anot less than ten days in advance of the hearing.@ 20 C.F.R. '702.335 (1977). In altering this provision, the Acommenting parties were unanimous in urging that ten days is inadequate notice@ of a hearing. 42 Fed. Reg. 42550 (Aug. 23, 1977). In comment, there was a suggestion that the ten-day notice period be

employer has not provided any substance to its allegation of prejudice,[2] or any indication that the expedited hearing impeded its defense of this case.

Employer submitted 39 exhibits at the hearing in this case, 37 of which were admitted

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retained in cases Awhere the claimant is seriously disabled and receiving no benefits.@ 42 Fed. Reg. 42550 (Aug. 23, 1977). However, Asince, as a practical matter, the guaranteed notice period will seldom affect the time between informal conference and formal hearing, and so many commentators wanted a guaranteed period for discovery, the suggestion [was not] adopted.@ *Id.* Moreover, the Federal Register states that Asuggestions [pertaining to an accelerated referral and hearing procedure] have been rejected because the drafters believe that accelerated handling of special cases can be accomplished individually within the framework of the final rules.@ 42 Fed. Reg. 42549 (Aug. 23, 1977).

[2] Section 19(c) of the Act also requires that the administrative law judge issue an order within twenty days of the hearing accepting or rejecting the claim. The Board, however, has held that the Atwenty day rule@ set forth in the Act and at 20 C.F.R. '702.349 is not mandatory. Rather, a failure to issue a decision within twenty days requires remand only where the aggrieved party shows that it was prejudiced by the delay. *Welding v. Bath Iron Works Corp.*, 13 BRBS 812 (1981). Similarly, we will consider whether employer was prejudiced by the shortened time period invoked by the administrative law judge in this case. *Id.*

into the record, HT at 4, in addition to a number of post-hearing depositions, but it made no apparent effort to secure either a deposition or an affidavit from Mr. Jenne, the witness it now asserts was necessary to its defense. Employer=s exhibits specifically include records kept by its carrier pertaining to the injury in this case, EXS 19-23, medical reports from four different physicians, EXS 30-34, 37, evidence for the purpose of attacking the overall veracity of claimant=s testimony regarding his alleged work accident and his notice thereof to employer, EXS 2, 3, 12-17, and a post-injury surveillance video presented in support of its position that claimant is not entitled to any disability benefits. EX 28. Employer further submitted an extensive post-hearing brief wherein it explicitly addressed its contentions regarding whether a work accident in fact occurred on November 23, 2000, and whether claimant established that he is currently disabled from any alleged work injury. Thus, the record establishes that employer fully defended its case and was not adversely impacted by the administrative law judge=s decision to expedite the hearing. Moreover, as discussed, *infra,* the testimony of Mr. Jenne does not affect the determination regarding timely notice of injury under Section 12. Employer therefore has not shown that it was prejudiced by the expedited hearing in this case. Consequently, we reject employer=s contention that it has been denied procedural due process in this case. *See generally Bath Iron Works Corp. v. Director, OWCP [Hutchins]*, 244 F.3d 222, 35 BRBS 35(CRT) (1st Cir. 2001).

Section 12

The record establishes, and the administrative law judge found, that claimant did not file a formal written notice of the injury with employer or the district director within 30 days as required by Section 12(a). Nonetheless, 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. *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). The implementing regulation states that Aactual 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). Moreover, 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).

In the instant case, the administrative law judge found that the injury report submitted to employer was prepared on or about December 24, 2000, one day past the thirty-day deadline espoused in Section 12(a). Nevertheless, based chiefly on the testimony of claimant, his fiancée, Linda Tustin, as well as by employer=s president and owner, Mr. Farrell, the administrative law judge concluded that employer=s staff had actual knowledge of the injury within ten days from the date that it happened. *Boyd*, 30 BRBS 218. In particular, the administrative law judge credited claimant=s hearing testimony and Mr. Farrell=s deposition testimony that claimant notified Mr. Farrell by telephone on or about November 30, 2000. CX 24 at 20; HT at 309, 314, 319. The administrative law judge also credited the testimony of Ms. Tustin that she personally contacted Mr. Farrell in November of 2000 to try and make arrangements for medical care. HT at 182-83. As it is supported by substantial evidence, we affirm the administrative law judge=s conclusion that employer had actual knowledge of the injury under Section 12(d)(1). Moreover, as employer had actual knowledge of the injury, notice to the carrier in the instant case is irrelevant, as Section 12(d) is satisfied if either Aemployer . . . or carrier@ has knowledge of the injury. 33 U.S.C. '912(d). Thus, any testimony of Mr. Jenne regarding claimant=s notification to the carrier would not affect the outcome, and his inability to attend the hearing cannot prejudice employer. The administrative law judge=s conclusion that the claim is not barred by operation of Section 12(a) is therefore affirmed. As employer has not raised any other contention concerning the administrative law judge=s award of benefits, it is affirmed.

Accordingly, the administrative law judge=s Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge