BRB No. 98-0824

CARLOS BUSTILLO	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SOUTHWEST MARINE, INCORPORATED	)	DATE ISSUED: March 8, 1999
	)	
and	)	
	)	
LEGION INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Paul A. Mapes, Administrative Law Judge, United States Department of Labor.

Stephen Birnbaum, San Francisco, for claimant.

Frank B. Hugg, San Francisco, California, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (96-LHC-102, 96-LHC-103) of Administrative Law Judge Paul A. Mapes awarding benefits 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).

This appeal involves a claim by claimant, a shipyard worker whose duties included sandblasting and painting, for compensation for the aggravation of his pre-existing asthma by work-related exposure to toxic substances. Claimant worked for employer until November 1, 1992, when he sustained a sandblasting injury to his face.[1] Claimant did not return to work after recovering from his sandblasting injury because his respiratory condition had worsened.

In his initial Decision and Order Awarding Medical Benefits filed November 8, 1996, the administrative law judge found that claimant's asthma was causally related to his employment, but that the claim was not timely filed pursuant to Section 13(b)(2) of the Act, 33 U.S.C. §913(b)(2). The administrative law judge's finding that the claim was barred under Section 13(b)(2) was based on his determination that claimant was, or should have been, aware of the relationship between his employment, his respiratory condition and his disability no later than October 23, 1992. The administrative law judge concluded that, inasmuch as the claim for respiratory impairment was not filed until October 31, 1994, the claim was not filed within requisite two-year period following claimant's date of awareness pursuant to Section 13(b)(2). Accordingly, the administrative law judge found that while claimant is entitled to medical benefits under Section 7 of the Act, 33 U.S.C. §907, he was not entitled to disability compensation.[2]

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[1]Claimant's sandblasting injury was the subject of a separate claim and is not relevant to the instant appeal.

[2]Thereafter, claimant filed a motion for reconsideration of the administrative law judge's Decision and Order. By Order dated December 4, 1996, the administrative law judge denied claimant's motion as untimely filed. The administrative law judge noted that information set forth in claimant's motion suggested that the Section 13(b)(2), 33 U.S.C. §913(b)(2), limitations period may have been tolled under the provisions of Sections 13(d) and 30(f), 33 U.S.C. §§913(d), 930(f), and that, therefore, there could be grounds for modifying the Decision and Order under Section 22, 33 U.S.C. §922. Accordingly, the administrative law judge ordered the parties to show cause why a Section 22 hearing should

not be held for the purpose of determining whether the Section 13(b)(2) limitations period had been tolled.

Both employer and claimant thereafter filed appeals with the Board. BRB Nos. 97-0462/A. On January 13, 1997, the administrative law judge issued a Notice of Intent to Conduct a Section 22 Hearing to determine whether there was a mistake of fact concerning the statute of limitations. By Order dated May 16, 1997, the Board dismissed both employer's and claimant's appeals as untimely filed, and remanded the case to the administrative law judge for Section 22 modification proceedings.

A Section 22 hearing on the statute of limitations issue was held on September 22, 1997, followed by oral argument on December 17, 1997. The administrative law judge determined that a mistake in fact in the initial Decision and Order warranted modification of that decision, and, accordingly, on January 28, 1998, issued the Decision and Order Awarding Benefits that is the subject of the instant appeal.

On modification, in a Decision and Order Awarding Benefits issued January 28, 1998, the administrative law judge found that the claim was not barred under Section 13(b)(2) inasmuch as the statute of limitations was tolled pursuant to Section 30(f) of the Act, 33 U.S.C. §930(f), by employer's failure to file a timely first report of injury under Section 30(a), 33 U.S.C. §930(a).[3] Next, the administrative law judge found that the claim is not barred by claimant's failure to give timely notice of his injury under Section 12(a) of the Act, 33 U.S.C. §912(a), inasmuch as employer failed to meet its burden of proof under Section 12(d), 33 U.S.C. §912(d), that it was prejudiced by claimant's failure to provide timely notice of his injury. The administrative law judge awarded claimant temporary total disability benefits from November 2, 1992 to December 13, 1994, permanent total disability benefits from December 14, 1994 to April 9, 1996, and permanent partial disability benefits commencing April 10, 1996, and granted employer credit for all compensation paid to claimant since November 1, 1992. Lastly, the administrative law judge awarded employer Section 8(f) relief, 33 U.S.C. §908(f).

On appeal, employer contends that the administrative law judge erred in finding that the claim is not barred under Section 13 and in finding that employer was not prejudiced by claimant's failure to provide timely notice of his injury under Section 12. Claimant responds, urging affirmance.

[3]The administrative law judge determined that the tolling provision of Section 13(d) of the Act, 33 U.S.C. §913(d), is not applicable to the instant case.

In the absence of evidence to the contrary, Section 20(b) of the Act, 33 U.S.C. §920(b), presumes that the notice of injury and the filing of the claim were timely. *See Shaller v. Cramp Shipbuilding & Dry Dock Co.,* 23 BRBS 140 (1989). In the instant case, the administrative law judge found that claimant was, or should have been, aware of the relationship between his employment, his asthma and his disability no later than October 23, 1992. A claim was not filed until October 31, 1994. This was also the first notice of injury received by employer.[4]

Claimant's failure to give employer timely notice of his injury pursuant to Section 12 of the Act is excused if employer had knowledge of the injury or employer was not prejudiced by the failure to give proper notice. 33 U.S.C. §912(d)(1), (2). Prejudice under Section 12(d)(2) is established where employer provides substantial evidence that due to 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. A conclusory allegation of prejudice or of an inability to investigate the claim when it was fresh is insufficient to meet employer's burden of proof. *See Kashuba v. Legion Ins. Co.,* 139 F.3d 1273, 32 BRBS 62 (CRT)(9th Cir. 1998), *cert. denied* 119 S.Ct. 866 (1999); *ITO Corp. v. Director, OWCP [Aples]*, 883 F.2d 422, 22 BRBS 126 (CRT)(5th Cir. 1989); *Bivens v. Newport News Shipbuilding & Dry Dock Co.,* 23 BRBS 233 (1990).

In his January 28, 1998 Decision and Order, the administrative law judge, noting that the only specific allegation of prejudice made by employer was that claimant's failure to provide timely notice precluded employer from obtaining Dr. Lee's treatment notes, determined that the unavailability of Dr. Lee's notes actually strengthened employer's case. The administrative law judge concluded, therefore, that employer failed to meet its burden of proving that it was prejudiced by claimant's failure to provide timely notice. We note that, on appeal, employer does not assign error to the administrative law judge's finding that employer's inability to obtain Dr. Lee's records did not prejudice employer. Rather, employer asserts on appeal that the delay in receiving notice made it difficult to identify witnesses and precluded employer from supervising claimant's medical care. We reject employer's arguments and affirm the administrative law judge's determination that employer was not prejudiced by claimant's failure to provide timely notice.

[4]In an occupational disease case such as this one, claimant must give employer notice of his injury within one year of his awareness of the relationship between the employment, the disease and the disability. 33 U.S.C. §912(a).

We note, first, that employer's conclusory allegation on appeal that the delayed notice made the identification of witnesses difficult is unsupported by evidence in the record. Indeed, our review of the hearing testimony of Paul Harris, the claims administrator who handled the claim for employer, indicates that Mr. Harris conceded that any potential difficulty in identifying witnesses did not prejudice him in investigating this particular claim. *See* Hearing Tr. at 346-355. Moreover, while employer generally asserts that it was prejudiced by its inability to supervise claimant's medical care, it does not allege that the medical care received by claimant was inappropriate. The instant case is thus distinguishable from *Kashuba,* in which the United States Court of Appeals for the Ninth Circuit held that, had timely notice allowed the employer to participate in the claimant's medical care, the employer might have been able to take measures to prevent the claimant from suffering additional disability and possibly to avoid surgery. 139 F.3d at 1276, 32 BRBS at 64 (CRT). As employer in the case at bar fails to support its generalized assertion of prejudice based on the delay in its ability to supervise claimant's medical care with any evidence that such supervision would have altered the course of claimant's medical treatment, we reject employer's assertion that it was prejudiced on this basis. Consequently, we affirm the administrative law judge's determination that Section 12 does not bar claimant's claim.

Employer also argues that the claim is barred by the two-year limitations period of Section 13(a), (b)(2), since the claim was filed over two years after claimant's October 23, 1992, date of awareness.[5] As we previously noted, Section 20(b) of the Act provides a presumption that the claim was timely filed; to overcome the Section 20(b) presumption, employer must preliminarily establish that it complied with the requirements of Section 30(a). Section 30(a), as amended, 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

[5]The occupational disease provisions of Section 13(b)(2), 33 U.S.C. §913(b)(2), which apply to the instant claim, provide that a timely claim is one which is filed within two years of claimant's awareness of the relationship between the employment, the disease and the disability.

> 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. *See Nelson v. Stevens Shipping & Terminal Co.,* 25 BRBS 277 (1992); *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 Steed v. Container Stevedoring Co.,* 25 BRBS 210 (1991). *See also Stark v. Washington Star Co.,* 833 F.2d 1025 (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. *See Steed,* 25 BRBS at 218; *Kulick v. Continental Baking Corp.,* 19 BRBS 115 (1986).

In the instant case, employer did not file the Section 30(a) report of injury until November 2, 1994; employer, argues, however, that it did not have knowledge of the injury for Section 30 purposes prior to the filing of the claim on October 31, 1994. Employer contends on appeal that it was erroneous for the administrative law judge to impute knowledge to the employer on the basis of the receipt by Mr. Harris, employer's claims administrator, of Dr. Cappozzi's medical report dated December 3, 1993, Cl. Ex. 11, and claimant's attorney's letter dated May 27, 1994, Cl. Ex. 9. We disagree, and hold that the administrative law judge rationally concluded that the information contained in Dr. Cappozzi's report and claimant's counsel's letter was sufficient to impute to employer the knowledge that claimant suffered from a work-related respiratory impairment and that, on the basis of this information, employer should have concluded that compensation liability was possible and, thus, that further investigation was warranted. *See Steed,* 25 BRBS at 218-219. We note, in this regard, that the administrative law judge first found that Dr. Cappozzi's report stating that claimant had not worked since January 16, 1993, because of chronic asthma provided employer with the knowledge that claimant had missed work due to asthma. Next, the administrative law judge found that employer was given sufficient reason to believe the asthma could be work-related, and, thus, was apprised of possible compensation liability, by claimant's counsel's letter requesting that the issue of claimant's asthma be resolved in the state forum[6] with an agreed medical

[6]We note that application of Section 30(f) does not require employer to have definite knowledge that the injury comes within the jurisdiction of the Act; the fact that the claim

examiner.[7] We therefore affirm the administrative law judge's determination that employer had knowledge that claimant sustained a work-related injury with possible compensation liability as of June 1994, when Mr. Harris received claimant's attorney's letter. Employer's knowledge as of that date, combined with employer's failure to file the required Section 30(a) report of injury within the requisite ten days, thus tolls the Section 13 statute of limitations. *See Steed,* 23 BRBS at 218-219. We therefore affirm the administrative law judge's finding that the instant claim was timely filed.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

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may arise under a state workers' compensation law does not excuse employer's failure to file a Section 30(a) report. *See Spear v. General Dynamics Corp.*, 25 BRBS 132 (1991).

[7]As noted by the administrative law judge, receipt of claimant's counsel's letter prompted Mr. Harris to forward the letter to employer's attorney with the notation "asthma?!." *See* Hearing Tr. at 329-331. Thus, the administrative law judge rationally found that the information in claimant's counsel's letter did, in fact, apprise employer of the need for further investigation. *See* Decision and Order at 5-6.