BRB No. 99-0394

RICHARD J. HIGGINS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
INTERMARINE, U.S.A.	)	
	)	DATE ISSUED: Dec. 23, 1999
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	
	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order and Supplemental Decision and Order Granting Attorney Fees of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Ralph R. Lorberbaum (Zipperer & Lorberbaum, P.C.), Savannah, Georgia, for claimant.

G. Mason White (Brennan, Harris & Rominger), Savannah, Georgia, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order and Supplemental Decision and Order Granting Attorney Fees (98-LHC-0222) of Administrative Law Judge Robert D. Kaplan 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). The amount of an attorney's fee award is discretionary and will not be set aside unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.,* 12 BRBS 272 (1980).

Claimant, hired in 1991 to work as a technician in employer's test and trials department, allegedly aggravated a pre-existing right shoulder condition as a result of overhead work which he performed for employer, particularly from late 1992 on.[1] Claimant testified that from time to time he advised his supervisor, James Stribling, that his right shoulder bothered him and he recalled that in 1994, employer's physician gave him an injection for pain in that shoulder. On December 11, 1996, Dr. Wheeler diagnosed impingement syndrome and on January 3, 1997, performed arthroscopic surgery on claimant's right shoulder.

Following this initial surgery, claimant returned to his regular job on January 6, 1997, but stated that this work caused his right shoulder to hurt more, leading Dr. Wheeler to schedule another surgical procedure on that shoulder. However, prior to the surgery, on March 31, 1997, claimant fell while working, injuring his right ankle and leg, as well as his right arm/shoulder as he grabbed onto some cables while he was falling.[2] Claimant stated that as a result of this fall his right shoulder pain intensified. Dr. Wheeler performed a decompression of claimant's right shoulder on April 17, 1997, and after a week of vacation claimant returned to light-duty work with

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[1]Claimant originally injured his right humerus and shoulder in 1968 while he was in the Navy, and he testified that his right shoulder would occasionally cause him pain when he did overhead work. Claimant testified that while at the beginning of his employment he used a computer to write test procedures, he began, in the latter part of 1992, to go onto ships and physically check out the electrical systems, including their overhead electrical cables.

[2]Claimant did not seek any disability benefits for his ankle or leg injuries.

employer on April 28, 1997. On June 1, 1997, claimant was laid-off from employer for reasons unrelated to his disability, and was not offered another job. Claimant eventually obtained employment with the Navy commencing on January 13, 1998, inspecting the mine ships which employer built. Claimant filed a claim for benefits due to his right shoulder injury on July 10, 1997.

In his decision, the administrative law judge determined that the claim is not barred by Section 12, 33 U.S.C. §912, as employer had actual knowledge of claimant's right shoulder condition prior to his initial surgery on January 3, 1997, that claimant's right shoulder condition is causally related to his work for employer, and that employer, in terminating claimant from its employ, did not violate Section 49 of the Act, 33 U.S.C. §948a. Accordingly, the administrative law judge concluded that claimant is entitled to temporary total disability benefits under Section 8(b), 33 U.S.C. §908(b), from April 17, 1997, to April 28, 1997, and from June 11, 1997, to January 13, 1998, as well as to medical benefits for all injuries related to his March 31, 1997, injury.[3]

Claimant's counsel thereafter filed an application for an attorney's fee with the administrative law judge, requesting a fee totaling $19,912.50, representing 66.375 hours of attorney time at an hourly rate of $300, plus $1,261.90 in expenses. In his Supplemental Decision and Order Granting Attorney Fee, the administrative law judge awarded a total of $7,818.75, representing 31.275 hours at an hourly rate of $250, plus expenses of $903.40.

On appeal, employer challenges the administrative law judge's findings that the claim is not barred by Section 12, that claimant's injury is work-related, and that claimant is entitled to temporary total disability benefits. Employer also appeals the administrative law judge's attorney's fee award. Claimant responds, urging affirmance.

Section 12

Employer initially asserts that the administrative law judge erred in finding that it had knowledge of the relationship between claimant's right shoulder injury and his alleged work-related injury of January 3, 1997, prior to July 10, 1997, and thus, erred

[3]The administrative law judge also found that claimant is not entitled to any permanent partial disability benefits or a nominal award as a result of his injuries.

in concluding that claimant's failure to give notice of his injury is excused by Section 12(d)(1), 33 U.S.C. §912(d)(1). Employer avers that while the record shows that it had knowledge of the right shoulder injury claimant sustained in the Navy and that claimant was having shoulder surgery, there is no evidence relating claimant's shoulder condition to his work for employer. Moreover, employer argues that as claimant submitted his medical bills for the January 3, 1997, surgery to employer's group health insurance plan and explicitly indicated on those forms that his reason for seeing a physician was not related to any injury at work is sufficient to rebut the Section 20(b), 33 U.S.C. §920(b), presumption that employer had knowledge of claimant's work-related condition.

Under Section 12(a), 33 U.S.C. §912(a), an employee in a traumatic injury case is required to notify the employer of his work-related injury within 30 days after the date of injury or the time when the employee was aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between his injury and employment. *See Bechtel Associates, P.C. v. Sweeney*, 834 F.2d 1029, 20 BRBS 49 (CRT)(D.C. Cir. 1987); *Bath Iron Works Corp. v. Galen*, 605 F.2d 583, 10 BRBS 863 (1st Cir. 1979). The failure to provide timely notice pursuant to Section 12(a) will bar a claim unless such failure is excused under Section 12(d), 33 U.S.C. §912(d)(1994), which provides alternative bases for excuse either where employer had knowledge of the injury or was not prejudiced by the failure to give timely notice. *Sheek v. General Dynamics Corp.*, 18 BRBS 151 (1986), *modifying on recon.* 18 BRBS 1 (1985). It is well-established that to have "knowledge" under Section 12(d), employer must have knowledge that the injury is work-related and reason to believe that compensation liability is possible. *Boyd v. Ceres Terminals*, 30 BRBS 218 (1997); *Williams v. Nicole Enterprises, Inc.*, 19 BRBS 66 (1986). The implementing regulation states that "actual knowledge" of the injury is deemed to exist if claimant's immediate supervisor is aware of the injury. 20 C.F.R. §702.216. The Board and courts have recognized that application of the Section 12(d)(1) knowledge exception may be precluded where claimant has previously certified on his group health insurance form that his injury was not work-related. *See Januszewicz v. Sun Shipbuilding & Dry Dock Co.*, 677 F.2d 286. 291, 14 BRBS 705, 712 (3d Cir. 1982); *Boyd*, 30 BRBS at 218; *Addison v. Ryan-Walsh Stevedoring Co.*, 22 BRBS 32 (1989).

In the instant case, claimant did not give notice of injury until he filed his claim on July 10, 1997. The administrative law judge did not determine claimant's "date of awareness," thus triggering claimant's duty to give notice under Section 12(a),

but found that employer had knowledge of claimant's injury under Section 12(d)(1), based on the testimony of claimant's supervisor, Mr. Stribling, that while working claimant would from time to time complain of right shoulder pain, claimant's testimony that he informed Mr. Stribling prior to January 3, 1997, that he was having surgery on his right shoulder, and the uncontradicted fact that around 1994, claimant was given an injection into his right shoulder by employer's physician on its premises. The administrative law judge, however, did not explicitly consider the evidence of record concerning whether employer was aware of the work-relatedness of claimant's condition, *i.e.*, that both claimant and Mr. Stribling testified that claimant never associated, in any way, his right shoulder pain to his work duties with employer, and claimant submitted his medical bills for the January 3, 1997, surgery to employer's group health insurance plan, explicitly indicating therein that his reason for seeking medical treatment is not related to any injury at work.

We nevertheless hold that any error committed by the administrative law judge in failing to address all of the relevant evidence pursuant to Section 12(d)(1) is harmless, since, as a matter of law, employer was not prejudiced by claimant's failure to give timely written notice of the injury. It is employer's burden to establish prejudice with more than a mere conclusory claim of its inability to investigate the claim while it was fresh. *Kashuba v. Legion Insurance Co.,* 139 F.3d 1273, 32 BRBS 62 (CRT)(9th Cir. 1998)*, cert. denied,* 119 S. Ct. 866 (1999)*; Jones Stevedoring Co. v. Director, OWCP,* 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). In this case, there is no evidence that employer was unable to effectively investigate the injury or to provide medical services.[4] *See generally Kashuba*, 139 F.3d at 1273, 32 BRBS at 62 (CRT); *Jones Stevedoring Co.,* 133 F.3d at 683, 31 BRBS at 178 (CRT); *Bustillo v. Southwest Marine, Inc.,* 33 BRBS 15 (1999); *Boyd*, 30 BRBS at 222. Accordingly, the administrative law judge's finding that Section 12 does not bar claimant's entitlement to benefits is affirmed.

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[4]Employer's only mention of prejudice before the administrative law judge is in its post-hearing brief, wherein it states that claimant's failure to provide timely notice prejudiced employer's rights since if timely notice was provided, it is certainly possible that alternative work could have been provided to claimant. Employer's Post-Hearing Brief at 10. This is insufficient evidence of prejudice as an employer may attempt to establish the retroactive availability of suitable alternate employment. *See generally Stevens v. Director, OWCP,* 909 F.2d 1256, 23 BRBS 89 (CRT)(9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991).

Section 20(a)

Employer next argues that the evidence of record is insufficient to invoke the Section 20(a) presumption, 33 U.S.C. §920(a). Additionally, employer asserts it established the lack of any casual nexus between claimant's right shoulder condition and his job duties with employer, and therefore rebutted the presumption. In support of its contention, employer cites claimant's testimony that he has always had problems with his right shoulder since injuring it in 1968, that he never made any mention to Mr. Stribling that his injury was work-related, and the statement by claimant's own treating physician, Dr. Wheeler, that he cannot state within a reasonable degree of medical certainty that claimant's right shoulder condition and the subsequent need for surgery is related to his work with employer.

In the instant case, the administrative law judge properly determined that claimant is entitled to the Section 20(a) presumption as it is undisputed that claimant sustained a harm, *i.e.*, a right shoulder injury for which he underwent two surgical procedures, and claimant has shown that working conditions, *i.e.*, overhead work, existed at employer's facility which could have aggravated his pre-existing right shoulder condition. *See Quinones v. H.B. Zachery, Inc.,* 32 BRBS 6 (1998); *Konno v. Young Brothers, Ltd.,* 28 BRBS 57 (1994). With regard to rebuttal, the administrative law judge correctly observed that ‖employer has provided no evidence to rebut this presumption,= Decision and Order at 7, as there is no evidence in the record, including claimant's testimony and Dr. Wheeler's opinion, that claimant's injury was not aggravated by his employment. *See generally Manship v. Norfolk & Western Ry. Co.,* 30 BRBS 175, 179 (1996). We therefore affirm the administrative law judge's determination that claimant's right shoulder injury is work-related.

Disability

Employer further contends that the administrative law judge erred in awarding temporary total disability benefits. In light of our affirmance of the administrative law judge's findings that the instant claim is not barred pursuant to Section 12, and that claimant's right shoulder injury is work-related, employer's contention that claimant is not entitled to temporary total disability benefits from April 17, 1997, to April 28, 1997, on these bases is without merit. As for the second period of temporary total

disability, June 11, 1997 to January 13, 1998, after determining, based on Dr. Wheeler's testimony, that claimant could not perform his regular work with employer after April 17, 1997, the administrative law judge determined that while the light duty job employer provided claimant beginning on April 28, 1997, constituted suitable alternate employment, employer did not show that suitable alternate employment existed after June 11, 1997, when claimant was laid-off for economic reasons, until January 13, 1998, when claimant was hired by the Navy. Citing *Mendez v. National Steel & Shipbuilding Co.*, 21 BRBS 22 (1988), the administrative law judge specifically found that claimant's lay-off from his light duty job with employer was not due to his misfeasance, and thus concluded that employer could not rely on that job to meet its burden of establishing the availability of suitable alternate employment after the job was made unavailable. This finding is in accordance with law and is affirmed. *Norfolk Shipbuilding & Dry Dock Corp. v. Hord*, 193 F.3d 797 (4th Cir. 1999);[5] *Vasquez v. Continental Maritime of San Francisco, Inc.,* 23 BRBS 428 (1990); *Mendez*, 21 BRBS at 22. The administrative law judge's award of temporary total disability benefits is therefore affirmed.

Supplemental Decision and Order Granting Attorney Fees

[5]In *Norfolk Shipbuilding & Dry Dock Corp. v. Hord*, 193 F.3d 797 (4th Cir. 1999), the United States Court of Appeals for the Fourth Circuit held that in order to rebut a worker's *prima facie* case that the worker was totally disabled during a layoff period, an employer must do more than point only to the one internal light-duty job that the employee held prior to being laid off. The Fourth Circuit continued by stating that in the context of a layoff from internal post-injury employment, as with all claims of total disability under the Act, an employer can satisfy its burden by demonstrating that there exists a range of jobs which the worker is realistically capable of securing and performing, and which are reasonably available in the open market.

Employer's contentions that the administrative law judge erred in awarding claimant's counsel an hourly rate of $250 and that the administrative law judge erred in awarding an attorney's fee in this case since claimant is not entitled to benefits on his claim are without merit. First, in considering the hourly rate requested, the administrative law judge agreed with employer's contention that the $300 per hour rate requested by claimant's counsel is excessive, and after considering evidence of prior fees received by claimant's counsel in similar cases,[6] the administrative law judge reduced the hourly rate requested, and concluded that a fee of $250 per hour is reasonable. *See Moore v. Universal Maritime Corp.,* 33 BRBS 54 (1999). Second, our affirmance of the administrative law judge's award of benefits in the instant case renders moot employer's contention that it is not liable for any attorney's fee. *See generally Mowl v. Ingalls Shipbuilding, Inc.*, 32 BRBS 51 (1998).

Accordingly, the administrative law judge's Decision and Order and Supplemental Decision and Order Granting Attorney Fees are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

[6]Specifically, that claimant's counsel was awarded an hourly rate of $200 in two earlier cases decided under the Act in 1994 and 1992.