BRB No. 06-0982

T.J.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
UNISYS CORPORATION	)	DATE ISSUED: 07/24/2007
	)	
and	)	
	)	
ACE INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

Stephen C. Resor (Sullivan, Stolier & Resor), New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2006-LDA-0394) of Administrative Law Judge Daniel F. Sutton 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.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *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 field service engineer, alleged that on August 14, 2004, he injured his back and shoulder while lifting a heavy box off a helicopter at Mosul, Iraq. He sought medical care for his shoulder at a Mosul emergency room within 24 hours of the injury but did not report any injury to his back. HT at 70. He was diagnosed as suffering a left

deltoid muscle strain and given pain relievers and muscle relaxants. CX 9. Claimant continued on to his permanent assignment at Habur Gate, Iraq, where he performed his job duties until his return to the United States in March 2005. Claimant conceded that he did not give employer notice of his back injury until February 13, 2005. Claimant sought on-going temporary total disability compensation from the date of his return to the United States, March 20, 2005.

In his Decision and Order, the administrative law judge found that although claimant failed to provide timely notice of his injury as required by Section 12(a) of the Act, 33 U.S.C. §912(a), such failure did not defeat claimant's claim as employer failed to establish by substantial evidence that it was unable to effectively investigate some aspect of the claim or that claimant's condition would differ from its current status if he had been treated within 30 days of the incident. 33 U.S.C. §912(d). Concluding that claimant's current back condition is related to the work accident, the administrative law judge awarded claimant temporary total disability compensation based on an average weekly wage of $1,836.13, from June 20, 2005, and continuing as well as related medical benefits.

Employer appeals, arguing that the administrative law judge erred in finding that it was not prejudiced by claimant's failure to give a timely notice of his back injury and in concluding that claimant's current back condition is related to the work accident. Claimant has not responded to this appeal.

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(a) of the Act. That administrative law judge found that employer was not prejudiced by claimant's late notice of injury either in its ability to investigate the claim or to provide medical treatment. Decision and Order at 17-18.

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 an 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 New Shipbuilding & Dry Dock Co.*, 23 BRBS 233 (1990). Claimant concedes that he did not inform employer of his work injury until six months after it occurred. Section 12(d) of the Act, 33 U.S.C. §912(d), provides in pertinent part:

> Failure to give such notice 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) 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 injury 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*, 525 U.S. 1102 (1999); *ITO Corp.*, 883 F.2d 422, 22 BRBS 126(CRT); *Bustillo v. Southwest Marine, Inc.*, 33 BRBS 15 (1999); *Bivens*, 23 BRBS 233.

The administrative law judge found that employer did not provide medical evidence or expert testimony that claimant's back condition would be different if it had had timely notice of claimant's injury or that it was precluded from fully investigating the incident. Decision and Order at 18. The administrative law judge also found that employer had an opportunity to perform its own medical examination of claimant as well as sufficient time to investigate claimant's working conditions and to interview his colleagues at work concerning the incident.

We affirm the administrative law judge's finding that employer did not establish it was prejudiced by claimant's late notice of injury. Employer's allegation on appeal that it could have ameliorated claimant's medical condition if it had had earlier notice is insufficient to establish prejudice. *Bustillo*, 33 BRBS at 16-17; *cf. Kashuba*, 139 F.3d 1273, 32 BRBS 62(CRT) (prejudice established where claimant underwent surgery before employer was notified of the injury). Moreover, employer's mere contention that it could not timely investigate the incident is insufficient to meet its burden of presenting substantial evidence that it was prejudiced. *Jones Stevedoring Co.*, 133 F.3d 683, 31 BRBS 178(CRT). 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 employer of his injury in a timely matter does not bar his claim for injuries to his back. *Boyd,* 30 BRBS at 223.

Employer also appeals the administrative law judge's finding that claimant's back injury is related to his employment. Once, as here, claimant establishes his *prima facie* case, he is entitled to the Section 20(a) presumption that his injury is causally related to his employment.[1] 33 U.S.C. §920(a); *see Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000); *see generally U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP,* 455 U.S. 608, 14 BRBS 631 (1982). The burden then shifts to employer to rebut the presumption with substantial evidence that claimant's condition was not caused or aggravated by his employment. *See, e.g., Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT)(5th Cir.), *cert. denied*, 124 S.Ct. 825 (2003). If the administrative law judge finds the presumption rebutted, he must weigh all of the evidence and resolve the causation issue based upon the record as a whole, with claimant bearing the burden of persuasion. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997). Claimant had lower back surgery in 1999 and neck surgery in 2001.

The administrative law judge found that employer rebutted the Section 20(a) presumption based upon the opinion of Dr. Gibbons, who opined that based on a lack of objective medical evidence, claimant's current condition was the result of his 1999 back surgery rather than an employment injury. EX B. Upon weighing the evidence as a whole, the administrative law judge discussed the opinions of Drs. Mahoney and Gibbons. Dr. Mahoney, who treated claimant for his prior injuries and has monitored claimant's condition since his return from Iraq, noted claimant's worsening pain and numbness and opined that it was the direct result of the injury in Iraq. CX 1. He stated that claimant had recovered from his surgeries prior to his employment with employer. He further noted that the lack of supporting recent objective testing was due to employer's failure to approve physical therapy and/or the necessary diagnostic testing. *Id.* On the other hand, Dr. Gibbons examined claimant only once and stated that while claimant did suffer a back injury on August 14, 2004, it had resolved and his current complaints were the result of his pre-existing back problems. EX B. The administrative law judge found the opinion of Dr. Mahoney, claimant's treating neurologist, more comprehensive and persuasive and that based on the medical and anecdotal evidence

[1] Employer does not argue that claimant did not establish his *prima facie* case in that a work incident did occur on August 14, 2004, and claimant does suffer a current back condition.

encompassing claimant's work history following the injury,[2] claimant established that his current low back condition is causally related to his employment. Decision and Order at 21.

It is well established that the administrative law judge is entitled to determine the weight to be accorded to the evidence of record. The administrative law judge's decision to credit the opinion of Dr. Mahoney over that of Dr. Gibbons is rational. *See Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). As the administrative law judge's finding that claimant's back condition is related to his injury in Iraq is supported by substantial evidence, we affirm the administrative law judge's award of benefits.

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

[2] Email correspondences during claimant's stay in Iraq reflect his medical condition and treatment he received for his shoulder and back, as well as his increased complaints of an inability to perform his job duties. CX E.