BRB No. 98-1236

WINSLOW SELVIG	)	
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Claimant-Petitioner	)	
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NORTH FLORIDA SHIPYARDS, INCORPORATED	)	DATE ISSUED: June 17, 1999
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	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

David N. Neusner (Embry and Neusner), Groton, Connecticut, for claimant.

Mary Nelson Morgan and Jeremy B. Akel (Cole, Stone, Stoudemire, Morgan & Dore, P.A.), Jacksonville, Florida, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (94-LHC-2841, 94-LHC-2842) of Administrative Law Judge Stuart A. Levin 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 the 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 filed a claim under the Act for injuries to his right hip, left knee, and feet. Claimant initially began working as a pipefitter in 1955, working for Jacksonville Shipyards from 1967 to August 1989. After leaving Jacksonville Shipyards, claimant accepted a job with employer, North Florida Shipyards, in November 1989, working as a pipefitter for three weeks before being laid off on December 5, 1989. Claimant

testified that during the course of his brief stint with employer, he suffered a traumatic injury to his right hip when a hatch cover hit him on the head causing him to strike his right hip on the edge of the hatch as he was climbing down to the work site. Tr. at 40 - 41.

Claimant suffered a series of medical problems prior to accepting employment with North Florida Shipyards. Claimant testified that while working for Jacksonville Shipyards, he suffered injuries to his fingers, elbow, and left knee, ultimately undergoing left knee surgery in 1972. *See, e.g.,* Tr. at 31-32; CX-10. In a procedure unrelated to his work, claimant also had implants inserted into both big toes due to pain associated with gout. Tr. at 33. Claimant had pre-existing osteoarthritis in various joints. Following his layoff from employer, claimant underwent hip replacement surgery on January 30, 1990. *See, e.g.,* Tr. at 43, 64. He filed a claim for a traumatic injury to the right hip and for repetitive trauma to the left knee on July 9, 1993, and amended his claim on January 12, 1995, to include repetitive trauma injuries to the leg, hip and feet.

The administrative law judge denied benefits in all claims. Initially, the administrative law judge found the claim for the traumatic hip injury barred as untimely. Specifically, the administrative law judge concluded that employer rebutted the presumption of timeliness under Section 20(b) of the Act, 33 U.S.C. §920(b), because claimant did not provide employer with timely notice of the injury as required by Section 12(a) of the Act, 33 U.S.C. §912(a), and because claimant did not file his claim within the time limits specified in Section 13(a) of the Act, 33 U.S.C. §913(a). Decision and Order at 12 - 14. The administrative law judge also found that claimant is not entitled to medical expenses for his hip condition because the testimony that claimant sustained a traumatic injury to his hip is not credible. *Id.* at 14 - 15. Claimant also was denied compensation for the hip injury on the basis that the condition was not aggravated or accelerated by repetitive work-related trauma. *Id.* at 15. With regard to the claims for the left knee and feet injuries, the administrative law judge concluded that the claims were timely filed, but nonetheless were not compensable because employer successfully severed the causal nexus between the injuries and claimant's employment with employer. *Id.* at 15 - 16.

Claimant appeals, contending that the administrative law judge erred in finding the claim for the hip injury to be barred under Sections 12 and 13 of the Act, and in finding none of the injuries work-related. Employer responds, seeking affirmance of the decision below.

We initially address claimant's contention that the administrative law judge erred in finding the claim for his traumatic hip injury barred under Section 13.

Section 13(a) applies in cases involving traumatic injuries and requires that claimant file his claim for benefits within one year of the time he becomes aware, or with the exercise of reasonable diligence should have been aware, of the relationship between his injury and his employment. 33 U.S.C. §913(a); s*ee Welch v. Pennzoil Co.,* 23 BRBS 395 (1990). The United States Court of Appeals for the Eleventh Circuit has held, consistent with other United States Courts of Appeals, that the time for filing a claim under Section 13(a) does not begin to run until the injured employee becomes aware of the full character, extent, and impact of the harm done to him as a result of the employment-related injury. *See Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22 (CRT) (11th Cir. 1990). Thus, claimant is not "aware" for Section 13 purposes until he knows, or has reason to know, that he has sustained a permanent injury which is likely to impair his wage-earning capacity. *See, e.g., J.M. Martinac Shipbuilding v. Director, OWCP [Grage],* 900 F.2d 180, 23 BRBS 127(CRT)(9th Cir. 1990); *Marathon Oil Co. v. Lunsford*, 733 F.2d 113, 16 BRBS 100(CRT)(5th Cir. 1984). In this case, claimant does not challenge the administrative law judge's conclusion that his date of awareness, and therefore the date the statute of limitations began to run, was no later than January 30, 1990, the date that claimant underwent hip replacement surgery.

Claimant argues, however, that the Section 13(a) statute of limitations was tolled by employer's failure to file a report under Section 30(a) of the Act, 33 U.S.C. §930(a), and that therefore his July 1993 claim is timely. The Section 20(b) presumption, 33 U.S.C. §920(b), applies to Section 13, placing the burden of proof on employer to produce substantial evidence that the claim was not timely filed. *See, e.g., Shaller v. Cramp Shipbuilding & Dry Dock Co.*, 23 BRBS 140 (1989). As part of its burden to rebut Section 20(b), employer must establish that it complied with the requirements of Section 30(a). Where employer has been given notice of the injury and fails to file a report under Section 30(a), the statute of limitations does not begin to run until such report has been filed. 33 U.S.C. §930(f); *Nelson v. Stevens Shipping & Terminal Co.*, 25 BRBS 277 (1992)(Dolder, J., dissenting). Claimant contends that the statute was tolled in this case, as employer was given notice when he reported the accident to Charles Ballard, a leaderman in the pipe shop with supervisory duties, on the date the incident occurred, but failed to file a report. However, contrary to claimant's contention, employer's knowledge of an accident is insufficient to impute notice of a work-related injury to employer, where employer was not notified that there is an injury associated with it. *Kulick v. Continental Baking Corp.*, 19 BRBS 115 (1986). In this case, although claimant notified employer of the accident, the administrative law judge found the evidence, including claimant's own testimony, uncontradicted that he did not inform his supervisors, or anyone else associated with employer, that an injury occurred.[1]

[1]Claimant testified that he reported the incident on the day it happened, but he

Consequently, the administrative law judge rationally concluded that the Section 13(a) statute of limitations was not tolled by employer's failure to file a report under Section 30(a) because employer had not been given notice of claimant's injury. We therefore affirm the administrative law judge's conclusion that the claim for claimant's traumatic hip injury is barred under Section 13.[2]

Claimant next contends that the administrative law judge erred in finding that there is no causal nexus between his employment with North Florida Shipyards and

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believed at the time that it was only a bruise that would heal, and it took a week for him to recognize the extent of the injury. Claimant also testified he never said anything else to his supervisors after initially reporting the accident on the day it happened. Tr. at 41, 51-54, 90; CX-6 at 17. Mr. Ballard testified that claimant reported the accident to him, but he knew nothing of the injury until attorneys contacted him years later. CX-5 at 12-13, 25. Furthermore, claimant's insurance forms for his hip replacement surgery indicated that the injury was not work-related. CX-3. *See Stevenson v. Linens of the Week*, 688 F.2d 93, 100 - 101 (D.C. Cir. 1982); *Sun Shipbuilding & Dry Dock Co. v. Walker*, 590 F.2d 73, 9 BRBS 399 (3d Cir. 1978); *Alston v. Safeway Stores, Inc.*, 19 BRBS (1986); *Sheek v. General Dynamics Corp.*, 18 BRBS 1 (1985), *modified on recon. on other grounds*, 18 BRBS 151 (1986); *Mattox v. Sun Shipbuilding & Dry Dock Co.*, 15 BRBS 162 (1982).

[2]Our affirmance of the administrative law judge's finding that the traumatic hip injury claim is time barred obviates the need to address claimant's allegations of error pursuant to Section 12 of the Act. Consequently, we decline to address the Section 12 issues in this appeal.

the injuries to his left knee, feet, and hip. Section 20(a) of the Act, 33 U.S.C. §920(a), provides claimant with a presumption that his injury is causally related to his employment. *Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995). Once claimant establishes that he suffered a harm, and that employment conditions existed or an accident occurred which could have caused, aggravated or accelerated the condition, claimant has established a *prima facie* case, and the burden shifts to employer to rebut the presumption with specific and comprehensive evidence sufficient to sever the causal connection between the injury and the employment. *See Swinton v. J. Frank Kelly, Inc.*, 554 F.2d. 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied,* 429 U.S. 820 (1976). If the administrative law judge finds that the Section 20(a) presumption is rebutted, the administrative law judge must weigh all of the evidence and resolve the causation issue on the record as a whole. *See Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990).

We agree with claimant that the administrative law judge's findings with respect to the hip injury cannot be affirmed.[3] The administrative law judge found the testimony that claimant sustained a traumatic hip injury was not credible. As claimant correctly argues, the administrative law judge did not analyze the evidence under Section 20(a).[4] Although the administrative law judge found that claimant suffered a harm, *i.e.,* a hip condition necessitating hip replacement surgery, Decision and Order at 15 - 16, he did not make a finding as to whether conditions existed at work or an accident occurred which could have caused or aggravated claimant's hip condition. Thus, we cannot determine whether the administrative law judge found invocation of the Section 20(a) presumption established. Consequently, we vacate

[3]Although we have affirmed the finding that the claim for disability benefits for the hip injury is time-barred, we must nonetheless address the merits of the claim because claimant seeks medical costs associated with the hip injury, and a claim for medical benefits is never time-barred. *See, e.g., Wendler v. American National Red Cross*, 23 BRBS 408 (1990) (McGranery, J., dissenting on other grounds).

[4]The administrative law judge's finding could be interpreted several ways in a Section 20(a) analysis. It is not clear from the language of the administrative law judge's Decision and Order whether he concluded that the traumatic accident did not occur, or whether the accident occurred but did not result in any harm to claimant; thus, it is not clear whether the administrative law judge found that invocation of the Section 20(a) presumption was not established, because claimant did not make his *prima facie* case, *see, e.g., Bolden v. G.A.T.X. Terminals Corp.,* 30 BRBS 71 (1996), or whether the administrative law judge found invocation established but erroneously placed the burden on claimant to affirmatively establish a causal connection between his hip injury and his work. In any event, the administrative law judge's findings cannot be affirmed.

the findings of the administrative law judge and remand for further consideration of this issue; on remand, the administrative law judge must address the evidence with respect to the traumatic hip injury in accord with Section 20(a).[5]

[5]We also note that the administrative law judge selectively analyzed the medical opinions of Drs. Campbell and Franco in finding that "the testimony that claimant sustained a traumatic injury to his hip in November 1989 is not credible." Dr. Campbell testified that any activity occurring within the last three or four months prior to his hip surgery (in January 1990) was inconsequential to the injuries in his hip and knee, EX-7 at 14, and that claimant's complaints of pain were not consistent with a traumatic hip injury. EX-7 at 20. However, this physician also testified that the hip condition was caused by osteoarthritis and that the accident may have acutely exacerbated that condition. EX-7 at 20. Similarly, although Dr. Franco indicated that claimant's pre-existing arthritic condition would result in the same hip condition, CX-6 at 33, he also concluded that the work-related accident accelerated the hip condition. CX-6 at 10. The administrative law judge must consider these physicians' opinions as a whole on remand, keeping in mind that employer is liable for the full consequences if a work accident aggravates or accelerates a pre-existing condition. *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966).

Furthermore, we cannot affirm the administrative law judge's finding that claimant's hip injury was not caused or aggravated by repetitive motion incurred during work for employer. Initially, the administrative law judge provided inconsistent conclusions as to whether the issue was properly before him. The administrative law judge stated on page two of his Decision and Order that "claimant seeks entitlement to compensation for a traumatic injury to his right hip and for repetitive trauma to his right hip," but concluded on pages 14 and 15 of his Decision that "claimant alleged that his hip pain was due to traumatic injury, not to any repetitive work activity." The administrative law judge must clarify on remand whether this issue was properly raised before him.[6]

If the administrative law judge finds the issue properly raised, we note that the administrative law judge's brief discussion of this matter does not accord with law. The administrative law judge concluded only that claimant's hip injury was not aggravated or accelerated by repetitive work-related trauma, without considering whether the Section 20(a) presumption was invoked. Moreover, the administrative law judge's failure to consider the evidence under Section 20(a) is not harmless because, if his finding is tantamount to an implicit finding that employer rebutted the presumption, it cannot be affirmed. The administrative law judge found that the hip condition was not aggravated or accelerated by repetitive motion because Drs. Pohl and Campbell both attributed claimant's need for hip replacement surgery to his degenerative arthritis, and because his short tenure with employer had no substantial effect on the arthritic condition. Decision and Order at 14. If the administrative law judge intended to find the Section 20(a) presumption rebutted by this determination, he misstated the standard. In order to rebut the presumption, it is insufficient for employer to demonstrate that the employment had "no substantial effect" on his pre-existing condition; rather, employer must affirmatively establish that the employment did not cause, aggravate, accelerate or contribute to claimant's disabling condition. *Bath Iron Works Corp. v. Director, OWCP [Shorette]*, 109 F.3d 53, 31 BRBS 19 (CRT) (1st Cir. 1997); *Sam v. Loffland Bros. Co.,* 19 BRBS 228 (1987). Consequently, we vacate the administrative law judge's findings in this regard and remand for the administrative law judge to reconsider the causation issue with respect to the hip injury pursuant to Section 20(a).

[6]We note that claimant asserted in his pre-hearing brief and at the hearing that repetitive work-related trauma caused an aggravation of his hip injury. *See* Pre-hearing brief; Tr. at 11; *Dangerfield v. Todd Pacific Shipyards Corp.*, 22 BRBS 104 (1989).

However, with respect to claimant's knee and foot injuries, the administrative law judge's findings relevant to causation are rational and supported by substantial evidence. Contrary to claimant's contention, the administrative law judge accorded claimant the benefit of the Section 20(a) presumption, finding that claimant established a *prima facie* case with respect to the left knee and feet injuries. The administrative law judge found that claimant suffered a physical harm, *i.e.,* an arthritic condition which resulted in toe implants and a total knee replacement, and that conditions existed in his position with employer which could have aggravated or accelerated that physical harm, *i.e.,* repetitive walking, climbing, crawling, kneeling and bending.[7] Decision and Order at 15 - 16. Furthermore, although the administrative law judge did not separate his rebuttal analysis from his consideration of the causation issue based on the record as a whole, any error he may have made in this regard is harmless, because he fully considered and weighed the relevant evidence and the evidence he credited is sufficient to rebut the Section 20(a) presumption and to establish the absence of causation under the proper standards. *See generally Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59 (CRT) (5th Cir.1998)*; Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140, 145 (1992).

With respect to the knee injury, Dr. Pohl testified that the knee condition had no relationship to his three week employment with employer, CX-3 at 12, and that the physical requirements of the position may have made his knee hurt, but had no effect on the natural course of the knee condition. CX-3 at 20 - 26. Dr. Campbell testified that the likelihood of claimant's short employment period affecting his knee condition was "approaching zero at the speed of light" and "almost impossible." EX-7 at 38 - 40. Thus, since the administrative law judge rationally concluded that these opinions were sufficient to affirmatively demonstrate that claimant's left knee condition was not caused or aggravated by his brief stint with employer, the administrative law judge's finding that the causal nexus was severed with respect to claimant's left knee injury is affirmed.[8] *Phillips v. Newport News Shipbuilding & Dry*

[7]Claimant also contends that the administrative law judge erred in failing to consider the effect of his 22 years of work in the shipyards in evaluating the causal nexus between claimant's employment and his injuries. The named employer is not liable for injuries that were not caused or aggravated by claimant's work for that particular employer. *Buchanan v. International Transportation Services,* 31 BRBS 81 (1997). The administrative law judge properly evaluated this claim by determining that the issue to be resolved was whether claimant's work with the named employer, North Florida Shipyards, caused or aggravated his condition. Decision and Order at 17.

[8]We also reject claimant's contention that the administrative law judge erroneously placed the burden of proof on claimant in finding that the causal nexus between claimant's

Dock Co., 22 BRBS 94 (1988).

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employment with North Florida Shipyards and his left knee and feet injury had been severed by finding rebuttal established for both injuries based on an absence of complaints. The administrative law judge relied on affirmative evidence, *i.e.*, the medical opinions of Drs. Pohl and Campbell, in reaching his determination, finding only that claimant's lack of complaints were supportive of those affirmative opinions. Decision and Order at 16 - 17.

The administrative law judge relied upon Dr. Pohl in finding that the causal nexus between claimant's employment with employer and his foot injury was severed. Dr. Pohl initially stated that claimant's degenerative arthritis was aggravated by his work activities with employer in his deposition of January 11, 1995, CX-2; however, it was determined that this opinion was based on the physician's mistaken belief that claimant had worked for employer for three months rather than only for three weeks. Thus, Dr. Pohl was deposed again on January 31, 1995, and, considering claimant's accurate work history, affirmatively concluded that claimant's foot condition had no relationship to claimant's brief stint with employer. CX-3 at 12, 19, 31. Consequently, the administrative law judge's conclusion that there is no casual connection between claimant's employment with employer and his feet injuries based on Dr. Pohl's opinion is rational and supported by substantial evidence, and is affirmed. *Phillips,* 22 BRBS at 96.

Accordingly, we vacate the administrative law judge's finding that claimant's hip injury is not work-related, and we remand the case for further consideration consistent with this opinion. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge