BRB No. 05-0234

LEA A. GREGG	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
UNITED STATES MARINE CORPS/MWR	)	DATE ISSUED: 11/30/2005
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Russell D. Pulver, Administrative Law Judge, United States Department of Labor.

Steven M. Birnbaum, San Francisco, California, for claimant.

Lawrence P. Postol (Seyfarth Shaw LLP), Washington, D.C., for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (00-LHC-2676) of Administrative Law Judge Russell D. Pulver 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 Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge if they 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 case is before the Board for the second time.

Claimant sustained a lower back injury while working for employer in Quantico, Virginia, on October 15, 1993. She subsequently returned to inventory work with employer, but increased pain beginning in 1994 prompted employer's voluntary payment

of disability and medical benefits.[1] Employer subsequently disputed the necessity of ongoing medical treatment. At the formal hearing before Administrative Law Judge Michael Lesniak on August 20, 1998, employer's medical expert, Dr. Henrickson, testified that the October 15, 1993, back injury had resolved within one week, and that claimant had suffered cumulative trauma, which he considered a new injury, in early 1994. Judge Lesniak accorded diminished weight to Dr. Henrickson's statements and, finding it impossible to distinguish between the need for ongoing treatment for claimant's work injury as opposed to her pre-existing back injury, awarded past and continuing medical benefits.

Claimant then filed the present claim, on July 27, 1999, seeking additional disability and medical benefits based on Dr. Henrickson's testimony that she suffered a separate work injury as of February 1, 1994. Administrative Law Judge David W. Di Nardi found claimant's claim for the alleged 1994 injury barred by the principles of *res judicata*, collateral estoppel, and election of remedies, as well as by the timeliness provisions of Sections 12 and 13 of the Act, 33 U.S.C. §§912, 913. Judge Di Nardi thus summarily denied benefits, and claimant appealed his decision.

The Board reversed Judge Di Nardi's findings that the principles of *res judicata*, collateral estoppel, and election of remedies barred claimant's 1994 claim. In addition, the Board vacated Judge Di Nardi's findings under Sections 12 and 13, and remanded the case for an evidentiary hearing, 29 C.F.R. §18.41(b), and for further consideration of the timeliness issue, including, specifically, the excuse and tolling provisions of Sections 12(d), 33 U.S.C. §912(d), and 30(f), 33 U.S.C. §930(f). *Gregg v. United States Marine Corps/MWR*, BRB No. 01-0462 (Feb. 14, 2002) (unpub.).

On remand, Administrative Law Judge Russell D. Pulver (the administrative law judge) initially found that claimant's February 1, 1994, claim was not barred by Section 12 or Section 13 of the Act. He then determined that claimant could not return to her usual employment, but that employer established the availability of suitable alternate employment as of May 14, 2003, at a post-injury wage-earning capacity at least equivalent to her pre-injury average weekly wage. Accordingly, the administrative law judge awarded periods of temporary and permanent total disability benefits,[2] as well as medical benefits pursuant to Section 7 of the Act, 33 U.S.C. §907.

---

[1] Employer paid temporary total disability benefits from February 9, 1994, to May 10, 1994, and from July 6, 1994, to May 25, 1995, and temporary partial disability from May 11, 1994, to July 5, 1994. Employer's Exhibit 2.

[2] In particular, the administrative law judge awarded temporary total disability for the periods from November 6, 1995, through March 30, 1997, and from May 14, 1997, through March 20, 2003, and permanent total disability benefits from March 20, 2003,

On appeal, employer challenges the administrative law judge's award of benefits. Claimant responds, urging affirmance.

Employer asserts that claimant knew of her "new" injury in 1994, yet she did not inform employer of it in a timely fashion as required by Section 12, nor did she timely file a claim in accordance with Section 13. Thus, employer argues that her claim should be barred by those provisions of the Act. Employer further contends that it was prejudiced by the lack of notice as the extensive lapse in time between the injury and notice thereof prevented it from locating any witnesses and fully investigating the case.

Sections 12 and 13 provide that in the case of a traumatic injury, as here, written notice of injury must be given and the claim for benefits filed within 30 days and one year, respectively, after claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between her employment, her injury and her disability. 33 U.S.C. §§912, 913; *Newport News Shipbuilding & Dry Dock Co. v. Parker*, 935 F.2d 20, 27, 24 BRBS 98, 112(CRT) (4th Cir. 1991); *Abel v. Director, OWCP*, 932 F.2d 819, 24 BRBS 130(CRT) (9th Cir. 1991).

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 of her date of awareness 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 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);

---

through May 14, 2003. The administrative law judge denied employer's request for Section 8(f) relief, 33 U.S.C. §908(f), as its liability for permanent disability benefits was for fewer than 104 weeks.

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), employer bears the burden of showing it lacked knowledge of the injury or that it was prejudiced by the lack of formal notice. *Steed v. Container Stevedoring Co.*, 25 BRBS 210 (1991); *Shaller v. Cramp Shipbuilding & Dry Dock Co.*, 23 BRBS 140 (1989). 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. Knowledge under Section 12(d)(1) requires that employer know of the fact of injury, as well as that it is work-related. *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 claimant became aware of the relationship between her February 1994 injury, her employment and her disability on September 30, 1996, the date upon which Dr. Henrickson examined claimant. The administrative law judge found that Dr. Henrickson opined that claimant experienced significantly increased pain related to lifting activities for employer in January and February 1994 and that claimant's resulting symptoms were very different from the low back pain previously experienced following the October 15, 1993, work injury.[3] The administrative law judge then found that despite having awareness of the February 1994 injury as of September 30, 1996, claimant did not notify employer of her alleged injury until July 27, 1999. Nonetheless, he found that employer had actual knowledge of the February 1994 injury as claimant immediately reported the injury to her manager. HT at 123; 20 C.F.R. §702.216. In addition, he determined that claimant was forced off the job because of significant pain, and that by April 1994 Dr. Kahanovitz had placed her on light-duty work, actions which further impute knowledge to employer in this case. Moreover, the administrative law judge found that employer had knowledge of the work-related injury at the time of claimant's "awareness" on September 30, 1996, when its own medical expert, Dr. Henrickson, opined that claimant suffered increased pain due to

[3] In contrast to employer's assertion that claimant sought benefits for one cumulative injury in her claim and then for a separate "jerking-tucking" injury at the hearing, the administrative law judge determined that her present claim related to both the heavy lifting she performed in her inventory work in 1994, as well as the "jerking-tucking" incident.

lifting activities in January and February 1994. EX 21. 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).[4] 33 U.S.C. §912(d)(1); *Boyd*, 30 BRBS 218. Section 12 thus does not bar the claim.

With regard to Section 13, Section 20(b) also provides a presumption that the claim was timely filed. *See, e.g., Shaller,* 23 BRBS 140. In order to overcome the Section 20(b) presumption, employer must preliminarily establish that it complied with the requirements of Section 30(a), 33 U.S.C. §930(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 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 as under Section 12(d)(1) 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) (Dolder, J., dissenting); *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*, 25 BRBS 210; *see also Stark v. Washington Star Co.*, 833 F.2d 1025, 20 BRBS 40(CRT) (D.C. Cir. 1987). Knowledge of the work-

[4] Additionally, as the administrative law judge properly found, 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 establishing prejudice pursuant to Section 12(d)(2). *See Jones Stevedoring Co.,* 133 F.3d 683, 31 BRBS 178(CRT); *I.T.O. Corp.*, 883 F.2d 422, 22 BRBS 126(CRT); *Bustillo v. Southwest Marine, Inc.*, 33 BRBS 15 (1999). The administrative law judge found employer's allegation of prejudice to be unfounded as it clearly had an adequate opportunity to investigate the claim. Decision and Order at 17.

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).

The administrative law judge rationally concluded that the information contained in Dr. Henrickson's report dated September 30, 1996, was sufficient to impute to employer the knowledge that claimant suffered a second work-related back injury in February 1994, 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. In this regard, Dr. Henrickson's report provided employer with knowledge that claimant had missed work due to back pain, *i.e.*, "patient was no longer working" as of February 15, 1994, following increased back pain due to inventory work, EX 21 at 3, and that the back pain could be work-related, *i.e.*, claimant appears to have "significantly increased [back] pain related to lifting activities with doing inventory at work in January/February 1994," EX 21 at 10. Thus, employer was apprised of the possible compensation liability for the January/February 1994 work injury as of September 30, 1996. We therefore affirm the administrative law judge's determination that employer had knowledge that claimant sustained a work-related injury in February 1994, with possible compensation liability as of September 30, 1996, when it received Dr. Henrickson's report. As employer did not file a Section 30(a) report until August 3, 1999, the administrative law judge properly found that claimant's July 27, 1999, claim was timely filed. *See Steed*, 23 BRBS at 218-219.

Employer next contends that the administrative law judge did not resolve the conflicting evidence regarding the cause of claimant's disability, nor did he consider its position that claimant's November 2002 fall represented a supervening event severing the causal connection between her present condition and the work injury. Employer also asserts that the administrative law judge's decision does not comport with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as he did not resolve the numerous conflicts in claimant's testimony, and did not fully discuss or provide any rationale for rejecting the opinions of Drs. Gordon, Rosenbaum and Foltz.

Once claimant establishes a *prima facie* case, Section 20(a) applies to presume that claimant's disabling condition is related to the work injury. If employer establishes that claimant's disabling condition was not caused by the work injury or is due to a subsequent event which was not the natural or unavoidable result of the initial work injury, then the administrative law judge must weigh all of the evidence in the record and resolve the causation issue based on the record as a whole. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *Cyr v. Crescent Wharf & Warehouse Co.*, 211 F.2d 454 (9th Cir. 1954); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 257, 28 BRBS 43(CRT) (1984). Where employer seeks

to be absolved of partial or total liability based on the occurrence of a subsequent event which it alleges is an intervening cause of the claimant's disability, it bears the burden of demonstrating that the disability was caused by the subsequent event. *See, e.g., Shell Offshore, Inc. v. Director, OWCP*, 112 F.3d 312, 31 BRBS 129(CRT) (5th Cir.1997), *cert. denied*, 523 U.S. 1095 (1998). Thus, in order to be relieved of liability the employer must establish that the work injury played no role in the claimant's disability due to the occurrence of the subsequent event. *Id.*

Claims arising under the Act are subject to the APA, *see* 33 U.S.C. §919(d), which requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law or discretion presented on the record." 5 U.S.C. §557(c)(3)(A). An administrative law judge thus must adequately detail the rationale behind his decisions and specify the evidence upon which he relied. *See Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988); *see also Williams v. Newport News Shipbuilding & Dry Dock Co.*, 17 BRBS 61 (1985); *Frazier v. Nashville Bridge Co.*, 13 BRBS 436 (1981).

In the instant case, the administrative law judge's recitation of the evidence contains a considerable discussion of the medical opinions of record, *see* Decision and Order at 4-13, and includes specific references to the opinions of Dr. Gordon, Decision and Order at 8, 9, 12, Dr. Foltz, *id.* at 9-10, and Dr. Rosenbaum, *id.* at 10, 11. The administrative law judge determined, having "weighed all the evidence in light of the case law" regarding causation,[5] that claimant sustained a cumulative industrial injury on February 1, 1994, while working for employer. Decision and Order at 14. In this regard, the administrative law judge specifically credited the opinions of Dr. Henrickson, "who opined that the January and February 1994 lifting incidents caused a significant increase in pain and went as far as to opine that the accident constituted a new injury," Decision and Order at 14-15, and Dr. Taylor, who "also opined that the February injury accelerated or made worse the previous injury and was so significant it forced claimant off the job," and further indicated "claimant would have likely recovered from the October 1993 injury" absent the 1994 injury. Decision and Order at 15. However, as employer contends, the administrative law judge did not provide sufficient reasoning explaining his decision to credit the opinions of Drs. Taylor and Henrickson over the contrary opinions of Drs. Gordon, Foltz and Rosenbaum.[6] Decision and Order at 19. We therefore vacate

[5] In light of the administrative law judge's statement, it is inferred that claimant is entitled to the Section 20(a) presumption with regard to her back injury and that employer, by virtue of the opinions of Drs. Gordon, Foltz, and Rosenbaum, established rebuttal thereof.

[6] In summarizing the evidence, the administrative law judge observed that Dr. Gordon concluded "the injuries occurring at work were soft tissue in nature and the

the administrative law judge's causation finding and remand this case for further explanation of the administrative law judge's rationale and basis for his selection of the credited medical opinions.[7]

Employer also argues that the administrative law judge used the wrong date for establishing the availability of suitable alternate employment, as he erroneously refused to consider two labor market surveys, one identifying jobs approved by Dr. Gordon in Virginia, and another identifying jobs approved by Dr. Hoffman in Hawaii, during earlier periods of time in which claimant resided in those locales. Based on these surveys, employer maintains that it established the availability of suitable alternate employment dating back to June 5, 1998. Employer further argues that at a minimum, its labor market survey dated May 14, 2003, upon which the administrative law judge relied, identified suitable jobs available as of June 1, 2002, thereby ending claimant's entitlement to total disability benefits as of that date.

As employer argues, it put forth several labor market surveys in an effort to establish the availability of suitable alternate employment. Rather than consider the relevance of each of these, the administrative law judge limited his discussion of suitable alternate employment to the most recent labor market study conducted by Mr. Sipe on May 14, 2003. While the administrative law judge acknowledged the retroactive labor market survey identifying suitable jobs in Virginia, conducted by Barbara Byers on May 20, 2003, he did not provide any reason for rejecting it. Moreover, the administrative law judge did not discuss the labor market survey performed by Donald Kegler on June 5, 1998, identifying jobs in Hawaii. EX 10.

---

surgery and treatment that followed were not related to any anatomical abnormalities caused by or permanently aggravated by her work-related injuries," Decision and Order at 8, that Dr. Foltz concluded that "claimant's 1994 injury was not the cause of her current condition," Decision and Order at 10, and that Dr. Rosenbaum "agreed with Dr. Gordon's conclusion that claimant's work injury did not cause her pathology or contribute significantly" to her present condition but rather that it was due to her "pre-existing spondylolysis," Decision and Order at 10.

[7] We, however, affirm the administrative law judge's rejection of employer's argument that claimant's fall at home on Thanksgiving Day 2002 was an intervening event sufficient to end its liability. As the administrative law judge concluded, the record demonstrates that employer has not established that the work injury played no role in the claimant's disability. *Shell Offshore, Inc.*, 112 F.3d 312, 31 BRBS 129(CRT); Decision and Order at 15; EXs 51, 66.

In the instant case, claimant's injury occurred while she was residing in Virginia, and the record establishes that she lived in both Virginia and Hawaii during the time that these labor market surveys were performed. *See See v. Washington Metropolitan Area Transit Authority*, 36 F.3d 375, 28 BRBS 96(CRT) (4th Cir. 1994); *see also Wood v. U. S. Dept. of Labor*, 112 F.3d 592, 31 BRBS 43(CRT) (1st Cir. 1997). Moreover, the medical evidence establishes that claimant was capable of performing light-duty work at various times prior to May 14, 2003, with the exception of the period of time for her back surgery on May 22, 2001, and subsequent recovery period. For instance, Dr. Hendrickson, upon whom the administrative law judge relied with regard to causation, recommended claimant's return to light-duty work on a gradual basis as of September 30, 1996, EX 21; Dr. Chow believed claimant was capable of sedentary to light-duty work for four to six hours a day as of June 4, 1998, EX 30; and Dr. Gordon opined, as of October 3, 2000, that claimant was capable of full-time employment in light or sedentary work. EX 43. Thus, employer's labor market surveys may be sufficient to establish the availability of suitable alternate employment as of those earlier dates. *See Stevens v. Director*, OWCP, 909 F.2d 1256, 23 BRBS 89(CRT) (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991) (retroactive study may be used if reliable); *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988) (employer meets its burden if it presents evidence of jobs which, although no longer open when located, were available during the time claimant was able to work); *Jones v. Genco, Inc.*, 21 BRBS 12 (1988) (finding suitable available jobs existed in 1979, based on 1983 labor market survey and fact that rehabilitation specialist had met with employee in 1978-79 and offered to place employee in a job).

Moreover, the administrative law judge's finding that claimant was totally disabled until May 14, 2003, is inappropriate to the extent that it is improperly tied to his finding of maximum medical improvement. In discussing the extent of claimant's disability the administrative law judge found:

> Here, through medical evidence and expert testimony, claimant established that following her injury in February of 1994, her lower back condition left her temporary totally disabled from November of 1995 through March of 1997, and from May 14, 1997, through March 20, 2003. However, once claimant reached maximum medical improvement on March 20, 2003, her condition became permanent and total. I find that claimant cannot return to her former employment. Therefore, claimant has met her burden, and is presumed to be totally disabled.

Decision and Order at 20. From this discussion, it appears that the administrative law judge limited his consideration of suitable alternate employment to after the date of maximum medical improvement despite the evidence that claimant may have been able to work at an earlier date. The date of maximum medical improvement separates

temporary from permanent disability, not total from partial disability. *Stevens*, 909 F.2d 1256, 23 BRBS 89(CRT). If employer establishes suitable alternate employment prior to the date that claimant reached maximum medical improvement, an award of temporary partial disability benefits may be appropriate. *See Admiralty Coatings Corp. v. Emery*, 228 F.3d 513, 34 BRBS 91(CRT) (4th Cir. 2000).

In light of this, we must vacate the administrative law judge's finding that employer established suitable alternate employment as of May 14, 2003, and remand this case for further consideration of employer's evidence on this issue. On remand, the administrative law judge must first identify the appropriate labor market for establishing the availability of suitable alternate employment at various times, *See*, 36 F.3d 375, 28 BRBS 96(CRT), recognizing that claimant may have been capable of performing such work prior to the time she reached maximum medical improvement. Once he has made this determination, he must then address all of employer's relevant evidence of suitable alternate employment, including, if appropriate, the labor market surveys conducted by Ms. Byers and Mr. Kegler. Based on the credited labor market survey evidence, the administrative law judge should determine the dates when any total or partial disability benefits are due and calculate claimant's post-earning wage-earning capacity during any periods when suitable alternate employment was available in order to discern her entitlement to partial disability benefits.

Accordingly, the administrative law judge's finding that claimant's claim is not barred by Section 12 or Section 13 of the Act is affirmed. The administrative law judge's finding that claimant's disabling back condition is related to her work injury in February 1994 is vacated, as is the finding that employer did not establish the availability of suitable alternate employment until May 14, 2003. The case is remanded for further consideration consistent with this opinion.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge