U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 18 January 2012

CASE NO.: 2010-LHC-01988
OWCP NO.: 02-208208

In the Matter of:

WILLIAM JONES,
Claimant,

v.

FLORIDA INTERNATIONAL TERMINAL,
Employer,

and

CHARTIS SPECIALTY INSURANCE COMPANY,
Carrier.

APPEARANCES:

William Jones, *Pro se*
For the claimant

Robert L. Bamdas, Esquire
For the employer/carrier

BEFORE: DONALD W. MOSSER
Administrative Law Judge

DECISION AND ORDER

This proceeding arises from a claim for workers' compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.*, (the Act). This case was referred to the Office of Administrative Law Judges on August 5, 2010.

Following proper notice to all parties, a hearing was held on April 5, 2011 at Miami, Florida. Exhibits of the parties were admitted in evidence at the hearing and in a post-hearing order.[1] The parties were also afforded the opportunity to submit briefs.

The findings of fact and conclusions of law set forth in this decision are based on my analysis of the entire record. Each exhibit and argument of the parties, although perhaps not mentioned specifically, has been carefully reviewed and thoughtfully considered.

ISSUES

The following issues remain for resolution:

1. whether the claimant provided the employer/carrier with proper notice of the injury involved in this matter; and if so,

2. whether the claimant has established that he suffered an injury that is covered under the Act while working for the employer; and,

3. the nature and extent of any disability suffered by the claimant while working for the employer.

FINDINGS OF FACT

Claimant is a fifty-one old male residing in Miramar, Florida. He completed high school in Florida and attended the University of Miami for two years. Following college, he mostly worked as a licensed swimming instructor. He joined the International Longshoremen's Association and began working as a longshoreman in the Miami area around 2003. Over the next several years, he worked for several companies as a longshoreman. His jobs included driving mules, forklifts, and trucks, as well as tying down containers and unloading ships. He last worked for the employer involved in this case, Florida International Terminal (FIT), on December 19, 2009. (Tr. 61; EX 1, pp. 4-10).

Mr. Jones filed the claim involved in this case on April 13, 2010, in which he alleged that he was injured on December 19, 2009, while working for FIT.[2] (EX 11). He claims he was working for the employer with another employee, named Rudy, on a vessel named Barcelona Express, and was picking up poles on the container ship when his fingers became numb because he pinched a nerve in his neck. (Tr. 22, 31, 38; EX 1, pp. 19-20; EX 11). He first sought medical treatment from his personal physician, Larry Shulruff, M.D., on January 26, 2010, who reported numbness in the claimant's hands due to carpal tunnel syndrome and radiculitis.

Claimant explained that he did not seek medical treatment until January of 2010, because he did not notice any discomfort in his hands until he was working as a longshoreman for

[1] References to ALJX, CX, and EX pertain to the exhibits of the administrative law judge, claimant, and employer, respectively. The transcript of the hearing is cited as Tr. and by page number.
[2] Claimant first reported the injury occurred on December 22, 2009, but later clarified that it occurred on December 19, 2009, his last day of employment with FIT. (EX 9-11; Tr. 26, 57).

another company at least two weeks after working for FIT. (EX 1, p. 28). Forklift driving requires the use of the driver's hands to turn the steering wheel on an often and repetitive basis because of the stationery rear wheels. The hands also are used to shift gears in the loading and unloading of pallets of cargo. The forklifts are equipped with solid rubber tires, making them rough to ride and difficult to steer. (Tr. 34-36, 60-61).

Mr. Jones returned to Dr. Shulruff on February11, 2010, because of continuing numbness in his hands, and the physician referred him to a neurologist, Islon Seliger, M.D. The neurologist examined the claimant on February 18, 2010 and he concluded that an MRI and possibly nerve conduction studies were needed before excluding a left cervical radiculopathy as the cause of the claimant's problem. (EX 5, pp 4-6). After conducting the MRI, Dr. Seliger reported on March 4, 2010 that he attributed the claimant's problem to some changes at C4-5 and suggested some physical therapy. (EX 5, p.1).

On March 5, 2010, the claimant notified FIT that he was injured while working for that employer in December of 2009. Mr. Jones visited the offices of FIT on that day and told the director of operations of the injury. The Form LS-202, Employer's First Report of Injury or Occupational Illness, was prepared and later signed by another FIT employee on March 11, 2010. FIT's carrier also completed a Form LS-202 regarding the injury on the following day. (Tr. 59; EX 9, 10). Employer filed its Form LS-207, Notice of Controversion of Right to Compensation, regarding this matter on April 1, 2010. (EX 12).

Mr. Jones was examined by Dr. Daniel J. Mastella on March 26, 2010 for a reported follow-up of carpal tunnel syndrome and radiculitis on the left side and bilateral epicondylitis. He complained at that time of moderate pain at his elbows and shoulders and some stiffness. The physician reported full range of motion and a normal EMG. He recommended physical therapy and follow-up exam in about six weeks. (EX 4).

Claimant did not seek physical therapy or return to Drs. Shulruff, Seliger and Mastella for treatment on his hands after March of 2010. However, there is some evidence he was treated at a hospital emergency room on August 11, 2010 for complaints of soreness to the right side of his neck. He was diagnosed with a muscle spasm and discharged with a non-prescription pain medication. (EX 2, p.2).

On March 24, 2011, an independent medical examination was conducted on the claimant for the employer/carrier by Dr. Daniel Sheldon. This physician, who is a board-certified orthopedic surgeon, examined the claimant and reviewed the claimant's medical history, work history, medical records and the reported symptoms. He diagnosed cervical spondylosis with stenosis and left upper extremities radiculopathy. He explained that this condition is degenerative in the cervical spine and was first seen in 2004 x-rays of the claimant's neck. He added that such arthritic changes do not require a traumatic or inciting event, but work-related exacerbation or aggravation can occur from a specific traumatic episode. He noted that the claimant stated the symptoms began while driving a forklift for most of the day, which the physician explained could have caused an aggravation of symptoms. He also explained that lifting a heavy object would be expected to cause a sharper pain with rapid onset of symptoms rather than several weeks later. (EX 2, pp.1-4). He also essentially testified by deposition that

the fact the claimant's symptoms did not manifest until four weeks after he claims he was injured makes it less likely that heavy lifting caused an aggravation of his arthritic condition. (EX 18, p. 16). He added, however, that the claimant's activities associated with driving a forklift in January of 2010 were more consistent with aggravating or accelerating degenerative changes in the spine. (EX 18, pp. 17-18).

I reiterate that the claimant did not work for FIT after December 19, 2009. However, he worked as a longshoreman for several other companies after that date and through March of 2010. (Tr. 36, 40; EX 7). Mr. Jones filed his claim against FIT instead of against any of his other employers because the work he performed for FIT was the hardest and he therefore assumed the injury occurred there on his last day of work. (Tr. 43). The payroll records of FIT indicate that there was an employee named Rudy Jordan working for FIT in 2009 and that he was not working for FIT on the Barcelona Express on December 19, 2009. (Tr. 57-59; EX 14).

Claimant earned wages as a longshoreman in 2008 of $10,691.00 or an average of $205.50 per week. (CX 1). He earned wages as a longshoreman of $9,935.00 in 2009 or an average of $191.06 per week. (CX 2). Mr. Jones has not worked as a longshoreman since March of 2010. (Tr. 45).

CONCLUSIONS OF LAW

Notice

Section 12(a) of the Act requires that notice of a traumatic injury for which compensation is payable must be given within thirty days after the injury, or within thirty days after the employee becomes aware of a relationship between an injury and the employment. 33 U.S.C. § 912(a). There is no question that the claimant involved in this case did not give the employer timely notice under Section 12(a), because he claims he was injured on December 19, 2009 and did not notify FIT of the injury until March 5, 2010. Moreover, he became aware of the injury when he was driving a forklift for another company some two weeks after December 19, 2009, sought medical care for the injury on January 26, 2010 and still did not report the injury to FIT until March 5, 2010. Thus, he unquestionably became aware of his injury in the middle of January of 2010 and still did not notify FIT for almost two months later.

Failure to provide timely notice under Section 12(a) bars a claim, unless excused under one of the provisions of Section 12(d). Failure to provide timely notice will not bar a claim if the claimant shows either that the employer had knowledge of the injury or that the employer was not prejudiced by the failure to give timely notice. 33 U.S.C. § 912(d)(1) and (2); *See Addison v. Ryan-Walsh Stevedoring Co.* 22 BRBS 32, 34 (1989).

The testimony of FIT's operations manager clearly establishes that the company did not know of the claimed December 19, 2009 injury until Mr. Jones visited his office on March 5, 2010 to report it. Therefore, claimant's untimely notice of his injury is not excused under Section 12(d)(1) of the Act.

I also agree with employer/carrier that it has been prejudiced by the lack of knowledge of the claimed injury until seventy-six days after it allegedly occurred. It could have investigated the accident and interviewed anyone working on that day, especially the employee named Rudy who Mr. Jones claims he was working with on that day. *See Strachan Shipping Co. v. Davis,* 571 F.2d 968 (5th Cir. 1978). Therefore, I find the claimant's failure to give timely notice to his employer is not excused under Section 12(d)(2). His claim for compensation against this employer for any injury suffered on December 19, 2009 is barred under Section 12(a) of the Act.

Injury

Assuming for the sake of argument that the claim in involved in this case could be considered timely or the claimant's failure to give timely notice is excused under Section 12(d), claimant must still prove that he suffered an "injury" within the meaning of the Act on that date. Section 2(2) of the Act defines "injury" as an "accidental injury or death arising out of and in the course of employment." 33 U.S.C. § 902(2). The claimant must establish a *prima facie* case that he has suffered an injury. To do so, he must prove that he sustained physical harm or pain and that an accident occurred or working conditions existed that could have caused the harm in the course of employment. *Kier v. Bethlehem Steel Corp.,* 16 BRBS 128 (1984). An injury cannot be found absent some work-related accident exposure, event or episode, and while a claimant's injury need not be caused by an external force, something must go wrong within the human frame. *Schoener v. Sun Shipbuilding and Dry Dock Co.*, 8 BRBS 630, 632 (1978). If a claimant establishes a *prima facie* case of injury, he is aided by a presumption pursuant to Section 20(a) of the Act that the "injury arose out of or in the course of employment." *Kelaita v. Triple A Machine Shop,* 13 BRBS 326, 330-331 (1981).

In order to invoke the Section 20(a) presumption, claimant must first prove his *prima facie* case. A claimant proves his *prima facie* claim for compensation by establishing two elements: (1) the claimant sustained physical harm or pain (which can include the aggravation or acceleration of a pre-existing injury) and (2) an accident occurred in the course of employment or conditions existed at work that could have caused the harm or pain of claimant. *See United States Industries/Federal Sheet Metal v. Director, OWCP (Riley),* 455 U.S. 608, 615 (1982); *Merrill v. Todd Pacific Shipyards Corp*., 25 BRBS 140 (1991); *Kier v. Bethlehem Steel Corp*., 16 BRBS 128 (1984); *Kelaita v. Triple A Machine Shop,* 13 BRBS 326, 331(1981); *Gold v. Director, Office of Worker's Compensation Programs, U.S. Dept. of Labor; Dolphin Services, L.L.C.*, 2011 U.S. App LEXIS 9018 (5th Cir. 2011).

I should also note that it is well-settled that a judge, in arriving at a decision in a claim, is entitled to determine the credibility of the witnesses, to weigh the evidence, and draw inferences from it, and is not bound to accept the opinion or theory of any particular medical examiner. *Banks v. Chicago Grain Trimmers Ass'n*, 390 U.S. 459 (1968); *Scott v. Tug Mate, Inc*., 22 BRBS 164, 165, 167 (1989). With this *caveat,* I initially note that the evidence regarding the events of December 19, 2009 is limited. Nevertheless, the medical evidence does establish that the claimant received some injury between December 19, 2009 and the middle of January of 2010 for which he first sought treatment on January 26, 2010. Thus, the first element of a *prima facie* case is established.

Claimant must also prove that there were working conditions on December 19, 2009, which could have caused the injury or "something to go wrong within the human frame." *Schoener,* 8 BRBS at 632. At the very least, it can be concluded that working conditions existed on that day which could have caused such a scenario. The evidence proves the claimant was working for FIT on December 19, 2009 and the employees apparently were unloading a container ship. All of the jobs that Mr. Jones performed for FIT and the other maritime companies obviously were difficult enough in nature to cause him to suffer a pinched nerve in his neck or aggravate his existing degenerative cervical condition. I therefore find that this evidence considered most favorably for the claimant is sufficient to prove the second element of a *prima facie* case of injury.

Once the presumption of Section 20(a) of the Act is invoked, the burden shifts to the employer to rebut the presumption with specific and comprehensive medical evidence severing the connection between such harm and the claimant's employment. *See James v. Pate Stevedoring Co*., 22 BRBS 271 (1989). An employer can rebut the Section 20(a) presumption by showing the accident, event, or condition did not give rise or aggravate the claimant's injury. *See Brown v. Jacksonville Shipyards, Inc.* 893 F.2d, 297 (11th Cir. 1990). Reliance on mere hypothetical probabilities in rejecting a claim is contrary to the presumption created by Section 20(a). *See Smith v. Sealand Terminal*, 14 BRBS 844 (1982). The testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. *See Kier v. Bethlehem Steel Corp.,* 16 BRBS 128 (1984). An employer need only introduce medical testimony or other evidence that controverts the existence of a causal relationship and need not necessarily prove another agency of causation. *O'Kelley v. Department of the Army/NAF,* 34 BRBS 29 (2000); *Stevens v. Todd Pacific Shipyards,* 14 BRBS 626 (1982), *aff'd mem.,* 722 F.2d 747 (9th Cir. 1983).

If the presumption is rebutted, the judge must weigh all the evidence and render a decision supported by substantial evidence. *See Del Vecchio v. Bowers*, 296 U.S. 280 (1935). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Universal Camera Corp. v. National Labor Relations Board,* 340 U.S. 474 (1951) (quoting *Consolidated Edison Co. v. Labor Board,* 305 U.S. 197, 229 (1938)); s*ee also Noble Drilling v. Drake*, 795 F.2d 478, 481 (5th Cir. 1986). I reiterate that an administrative law judge is entitled to weigh the evidence, and draw inferences from it, and is not bound to accept the opinion or theory of any particular medical examiner. *Banks v. Chicago Grain Trimmers Ass'n*, 390 U.S. 459 (1968); *Scott v. Tug Mate, Inc*., 22 BRBS 164, 165, 167 (1989).

The balance of evidence in the record regarding Mr. Jones' claim of injury supports the employer/carrier. Mr. Jones's allegations that he suffered an injury as claimed simply are not credible. First, he claims he was working with an employee named Rudy in unloading the Barcelona Express, but the records of FIT do not prove an employee with that name was working on that ship on that day. Secondly, after testifying inconsistently regarding the injury and his work on that day, he candidly admitted that he just "assumed" later that he was injured on that date because that was the last day he worked for FIT and he described his work with that company as the hardest work that he performed as a longshoreman. Finally, the medical opinion of Dr. Sheldon establishes that because of the nature of the claimant's injury it was more likely that Mr. Jones injured himself while driving a forklift for another company in January of 2010.

For these reasons, I find that the employer/carrier has rebutted the Section 20(a) presumption that the claimant suffered an injury while working for FIT. Moreover, the totality of the evidence clearly proves Mr. Jones was not injured on December 19, 2009, while working as a longshoreman for FIT. Therefore, his claim for benefits under the Act must be denied.

Nature and Extent of Disability

Under the Act, "disability" is defined as the "incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or other employment." 33 U.S.C. § 902(10). Generally, disability is addressed in terms of its extent, total or partial, and its nature, permanent or temporary. A claimant bears the burden of establishing both the nature and extent of his disability. *Eckley v. Fibrex and Shipping Co.,* 21 BRBS 120, 122 (1988); *Trask v. Lockheed Shipbuilding and Construction Co.,* 17 BRBS 56, 59 (1985).

The extent of disability is an economic concept. *See New Orleans (Gulfwide) Stevedores v. Turner,* 661 F.2d 1031, 1038 (5th Cir. 1981); *Quick v. Martin,* 397 F.2d 644, 648 (D.C. Cir. 1968). Thus, in order for a claimant to receive an award of compensation, the evidence must establish that the injury resulted in a loss of wage earning capacity. *See Fleetwood v. Newport News Shipbuilding and Dry Dock Co.,* 776 F.2d 1225, 1229 (4th Cir. 1985). To establish a *prima facie* case of total disability, the claimant must show that he cannot return to his regular or usual employment due to his work-related injury. "Usual" employment is the claimant's regular duties at the time that he was injured. The claimant's credible complaints of pain alone may be enough to meet his burden. *Anderson v. Todd Shipyards Corp.,* 22 BRBS 20 (1989); *Richardson v. Safeway Stores,* 14 BRBS 855 (1982).

I reiterate that the claimant bears the burden of establishing both the nature and extent of his disability. *Eckley,* 21 BRBS at 122; *Trask,* 17 BRBS at 59. The medical evidence in this record fails to meet this burden. None of the physicians who examined or treated the claimant for the injury involved in this case expressed an opinion that Mr. Jones is disabled because of his condition. There is no evidence that any of them released him from work because of his injury. Further, the claimant did not seek any physical therapy for his condition although some of the physicians recommended it. Rather, it appears the claimant just walked away from his longshoreman positions in March of 2010 rather than attempt to improve his condition through therapy or other treatment. Thus, I conclude claimant has not proven that he is disabled by any injury suffered while working for FIT.

Conclusions

For the above-stated reasons, I find the claimant did not timely notify the employer that he was injured while working for that company in accordance with Section 12 of the Act. Moreover, he has not established under Section 2(2) that he suffered an injury on December 19, 2009. The medical evidence also does not prove that Mr. Jones suffered any disabling injury while working for the employer in 2009. These findings render moot any remaining questions regarding such matters as the claimant's average weekly wage, his compensation rate and whether another maritime employer of the claimant is responsible for the payment of benefits. Thus, the claim involved in this proceeding must be denied.

ORDER

I find the claim involved in this case of William Jones against Florida International Terminal/Chartis Specialty Insurance Company for benefit under the Act is denied.

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DONALD W. MOSSER
Administrative Law Judge