U.S. Department of Labor

Office of Administrative Law Judges
36 E. 7th St., Suite 2525
Cincinnati, Ohio 45202

(513) 684-3252
(513) 684-6108 (FAX)

Issue Date: 11 January 2011

Case No.: **2009-LHC-711**

In the Matter of:
JASON D. CONLEY,
Claimant

v.

NORFOLK SOUTHERN CORPORATION,
Employer
and
NORFOLK SOUTHERN RAILWAY CO.,
Carrier

Appearances:
Christopher D. Kuebler, Esq.
Birmingham, Michigan
For the Claimant

Christopher R. Hedrick, Esq.
Mason, Mason, Walker & Hedrick, P.C.
Newport News, Virginia
For the Employer/Carrier

Before: Alice M. Craft
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the "Longshore Act").[1] The Longshore Act and implementing regulations[2] provide for payment of medical expenses and compensation for disability or death of maritime employees other than seamen injured on navigable waters of the United States or adjoining areas. In this case, the Claimant alleges that he is permanently and totally disabled by a right shoulder and neck injury caused by a workplace accident in September 2003.

---

[1] 33 U.S.C. § 901, et seq.
[2] 20 C.F.R. Part 702.

I conducted a hearing on this claim on October 23, 2009, in Cincinnati, Ohio. Transcript ("Tr.") at 1. All parties were afforded a full opportunity to present evidence and argument, as provided in the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges.[3] At the hearing, Claimant's Exhibits ("CX") 1–49, and Employer's Exhibits ("EX") 1–26, were admitted into evidence without objection. Tr. 14–15. Two witnesses testified at the hearing: the Claimant, Tr. 16-68, and Mr. Dee Morgan Mauk, Tr. 68-81. The record was held open for 90 days after the hearing to allow the parties to file closing briefs. Tr. 81–82. Both parties timely submitted their closing arguments, and the record is now closed.

In reaching my decision, I have reviewed and considered the entire record, including all exhibits, the testimony at hearing and the arguments of the parties.

STATEMENT OF THE CASE

The Claimant worked for the Employer from May 1997 until February 2005. He was not formally terminated, however, until February 27, 2006. CX 11. The Claimant states that he was employed as a heavy equipment operator, where he ran equipment, performed clean-up, shoveled coal, and loaded coal onto barges. Tr. 18-19. He alleges that these job duties required him to perform physical work involving the pulling of his shoulders and arms.

On September 27, 2003, the Claimant was shooting water into the bottom of a clogged coal chute when the coal broke loose. He alleges that when he moved out of the way, he stood up into an I-beam and injured his neck and shoulder. Tr. 20. The Claimant states that he was not having any problems with his right shoulder before the accident, but that he began experiencing severe shoulder pain immediately afterwards. Tr. 21-22. He contends that he reported the accident to his supervisor and was taken to the hospital, but he could not remember the medical diagnosis. He returned to work following the accident, but then took family medical leave to undergo sinus surgeries from December 2003 until November 2004. Tr. 40. After returning to work in November 2004, the Claimant contends that he continued to have inflammation and pain in his right shoulder. Tr. 25. The Claimant states that he was involved in a four-wheeler accident in January 2005, but alleges that this did not make his shoulder injury any worse. Tr. 26. He maintains that he informed the Employer in February 2005 that he could no longer work because of his shoulder injury. Tr. 27. He has since undergone three shoulder surgeries and states that a fourth has been recommended. Tr. 29.

In his claim, the Claimant alleges that he is permanently and partially disabled from his injury, and has a dramatically reduced wage earning capacity. He therefore claims that he is entitled to disability benefits under the Longshore Act. He also claims that he requires a fourth shoulder surgery, but that the Employer has refused to authorize or pay for the surgery. In addition, he alleges that he has outstanding residual medical expenses that need to be paid. The Claimant thus argues that he is entitled to payment of medical expenses under Section 7(a). Finally, the Claimant alleges that the

[3] 29 C.F.R. Part 18.

Employer failed to timely controvert his entitlement to compensation under the Longshore Act, and is therefore obligated to pay a penalty under Section 14(e).

The Employer contends that the Claimant has failed to present any medical evidence that he sustained a shoulder injury on September 27, 2003. It acknowledges that the Claimant has testified that he suffered the injury, but argues that this testimony is inconsistent with company records and the records of the treating physicians, which make no mention of any shoulder injury caused by the September 2003 accident. Emp. Br. 33. The Employer contends that the Claimant did not mention a shoulder injury to his physicians until after he was injured in a four-wheeler accident in January 2005. Tr. 11, Emp. Br. 35. The Employer concedes that an accident occurred on September 27, 2003, but denies that the Claimant suffered a resulting shoulder injury. The Employer also argues that the Claimant has not suffered any loss of wage earning capacity, and points to the Claimant's used car company as proof that he has continued to earn income even after he was injured and ceased working for the Employer. While the Claimant does not pay himself a salary, the company pays for his utility bills, his mortgage, his car payments and his insurance, and has paid for several vacations. The Employer contends that this shows that the Claimant has earned money from his business, and has therefore not experienced a loss of wage earning capacity since he last worked for the Employer in 2005. Emp. Br. 50.

The Employer also alleges that the Claimant's claim is time barred under Sections 12 and 13 of the Longshore Act. The Employer contends that formal written notice of the shoulder injury was not received until February 2006, which was after the Claimant had already undergone three shoulder surgeries. Emp. Br. 53. In addition, the Employer argues that this notice contained an incorrect accident date of June 2003, and that a correct date of September 27, 2003 was not provided until February 2009. The Employer thus argues that the Claimant failed to give timely notice under Section 12, and that they were prejudiced by the untimely notification of the Claimant's injury. Because the correct accident date was not provided until February 2009, the Employer further contends that the Claimant failed to file a timely claim under Section 13. Emp. Br. 54-55. The Employer's final argument is that the Claimant failed to formally request permission for medical treatment, so it has not been given the opportunity to provide or refuse such treatment. Accordingly, the Employer contends that the Claimant is not entitled to payment for medical expenses under Section 7.

ISSUES

The issues before me are:

1. Whether the Employer had timely notice of the injury.

2. Whether the Claimant filed a timely claim.

3. Whether the Claimant's injury arose out of and in the course of the Claimant's employment with the Employer.

4. The nature and extent of the Claimant's disability.

5. Whether the Claimant has lost earning capacity.

6. The Claimant's entitlement to payment of medical bills and out of pocket expenses.

7. Whether the Employer filed a timely notice of controversion of the Claimant's claim.

Tr. 7-13; Claimant's and Employer's Post-Hearing Statements. For the reasons discussed below, however, I find that the Claimant failed to give the Employer timely notice of his injury as required by Section 12 of the Longshore Act. I also find that the Claimant has failed to establish a prima facie case for compensable medical treatment under Section 7 of the Longshore Act. Because these conclusions require the Claimant's claim to be denied, I will not discuss the remaining contested issues in this case.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Summary of the Relevant Evidence

Because I find that the Claimant failed to give the Employer timely notice of his injury and has failed to establish a prima facie case for compensable medical treatment, I will only summarize the evidence relevant to these two issues. The Claimant was 35 years old at the time of the hearing and 34 years old when the Employer deposed him on August 4, 2009. Tr. 16, EX 11. He graduated from high school and obtained 2 years of training in the welding program at Scioto County Joint Vocational School. Tr. 16, EX 11, EX 26. The Claimant is currently unmarried. Tr. 16.

The Claimant was hired by the Employer on May 16, 1997 to work as an equipment operator. Tr. 18, CX 11, CX 12. He was employed at a facility located in Wheelersburg, Ohio. Tr. 19. His job duties involved running heavy equipment, doing clean-up, shoveling, and greasing. Tr. 18. He was also engaged in loading barges with coal. Tr. 19. He testified that his job involved physical labor and required the pulling of his shoulders and arms. Tr. 18-19.

In his answers to the Employer's interrogatories, the Claimant indicated that he had initially injured his right shoulder in "[a]pproximately 1997" while working for the Employer, but that he refused treatment. EX 15. The Claimant did not discuss this injury at the hearing or his deposition. However, the medical report and treatment notes of Dr. Gerardo Trinidad, who was the Claimant's orthopedic surgeon in 2005, discuss a 1998 work-related accident as the cause of the Claimant's shoulder problems. CX 26, EX 8. Dr. Trinidad reported that the Claimant had slipped and fallen while stepping off of a barge at work, and had fallen on his right shoulder. At his deposition, Dr. Trinidad testified that this was the only accident that the Claimant had disclosed during his examination. EX 12.

The Claimant testified that he had also been injured in a car accident in August 1999. Tr. 21, DX 11. He stated that he suffered an injury to his right shoulder, and that he had been examined by Dr. Hanzel and had undergone testing. Treatment records from the Southern Ohio Medical Center indicate that the Claimant was suffering from pain to his neck and right shoulder after the accident. CX 20. An examination report completed by Dr. Christine McKain on August 28, 1999 diagnosed the Claimant with an acute cervical strain/sprain. CX 20. Dr. Hanzel's treatment notes from September 1999 acknowledge that the Claimant had been injured in a car accident and had been given pain medications. EX 3. At his deposition, Dr. Hanzel testified that September 1999 was the first time that the Claimant had mentioned any type of shoulder pain to him. EX 18. The Claimant underwent an MRI of his shoulder on September 14, 1999, which was normal. CX 20, EX 13. A subsequent MRI in November 1999 revealed possible bursitis in the anterior subacromial bursa of the Claimant's right shoulder. CX 20, EX 13. The Claimant was reexamined by Dr. Christopher Rink in January 2000, who found that the Claimant had suffered a "right acromioclavicular joint strain versus persistent symptoms from a anterior subacromial bursitis" as a result of the auto accident. CX 21, EX 4. The Claimant testified, however, that his shoulder injury from the accident had "healed up" after a period of time and that he was able to return to work. Tr. 21, DX 11.

The Claimant testified that on September 27, 2003, he was injured while loading coal onto a barge. Tr. 19, EX 11. He stated that he was trying to unplug coal from a coal chute when the coal broke loose. Tr. 20. He tried to get out of the way and stood up into an I-beam. He testified that the I-beam hit him in the side of the head and came down onto his shoulder. The Claimant reported the accident to his supervisor, Dee Mauk, Tr. 22, and several injury reports were completed by the Employer. CX 4-6. The Claimant also completed an accident report, but did not mention that he had injured his shoulder. CX 3. Instead, the Claimant only reported that he had hit his head. The accident reports completed by the Employer also stated that the Claimant had hit his head, and reported a resulting injury of a sore and stiff neck. CX 4-6. There was no mention of any shoulder injury. After the accident, the Claimant was examined in the emergency room at Southern Ohio Medical Center, which led to a diagnosis of a muscular strain in the Claimant's neck. CX 23, EX 5. However, the treatment records contained no indication that the Claimant had suffered an injury to his right shoulder.

The Claimant returned to work after the accident, but took leave from October 1-6, 2003 for an unrelated illness. Tr. 38, EX 26. During this time, he was examined by Dr. Hanzel with symptoms of a cough and congestion, sore throat, ear ache, and body aches. EX 3. There was no mention of any shoulder pain. Dr. Hanzel, however, gave the Claimant a full release to return to work on October 6, 2003. CX 23. The Claimant testified that after the accident his shoulder was "really strained and bothering" him while he performed his job duties for the Employer. Tr. 24. He was examined several times by Dr. Hanzel in October and November 2003, but never mentioned the September 2003 accident. Tr. 39, EX 11, EX 18. Instead, Dr. Hanzel's treatment notes indicate that the Claimant suffered from the above-stated symptoms, which led to a diagnosis of a sinus infection. EX 3. As a result, the Claimant underwent surgery to relieve his sinus condition, which required him to take leave from the Employer from December 2003 until November 2004. Tr. 24, 41, EX 26. During this period, the

Claimant continued to be regularly examined by Dr. Hanzel. The treatment notes, however, only discussed the Claimant's sinus congestion and feelings of stress; there was no mention of any shoulder pain or shoulder injury. EX 3.

The Claimant returned to work in November 2004. He testified that he worked for the Employer until January 2005. Tr. 25. The Claimant was then involved in a four-wheeler accident on January 14, 2005, in which he injured his right shoulder. Tr. 46, CX 24. Emergency room records from Southern Ohio Medical Center reported that the Claimant had wrecked his four-wheeler, which landed on his right shoulder, and had suffered a shoulder contusion. CX 24. A shoulder x-ray was negative for any fracture or dislocation. CX 24. The Claimant was subsequently examined by Dr. Hanzel on January 18, 2005, who recorded the shoulder injury and referred the Claimant for an MRI of his right shoulder. EX 3, 18. An MRI taken on January 22, 2005 demonstrated "[s]mall partial-thickness undersurface tear of the distal supraspinatus tendon" and "[m]oderate AC joint arthropathy with hypertrophy." EX 13.

Dr. Hanzel then referred the Claimant to Dr. Trinidad for an orthopedic evaluation on February 9, 2005. EX 3, 18. Dr. Trinidad examined the Claimant on February 11, 2005, and noted a history of right shoulder pain caused by a work-related accident that occurred in 1998. CX 26, EX 3. There was no mention of the September 2003 work accident or the January 2005 ATV accident. As noted above, Dr. Trinidad testified at his deposition that the 1998 work incident was the only injury that the Claimant had disclosed to him. EX 12. In his report, Dr. Trinidad diagnosed the Claimant with "[r]ight shoulder impingement syndrome" and recommended that the Claimant undergo surgery to resolve the shoulder condition. CX 26. Dr. Trinidad performed an exploratory procedure on the Claimant's right shoulder in March 2005. CX 25, EX 3. The surgery report indicated that the Claimant's 1998 work accident was the cause of his shoulder problems. Dr. Trinidad performed two additional surgeries in August 2005 and February 2006. CX 27, CX 29, EX 3. He testified at his deposition that he last examined the Claimant in January 2007 and had recommended a fourth surgical procedure. EX 12.

The Claimant completed a Form LS-201 "Notice of Employee's Injury or Death" on December 1, 2005, in which he identified that he had suffered shoulder and neck injuries in a work accident in June 2003. CX 1, EX 26. The notice was received by the Employer in February 2006. EX 26. The Claimant filed a Form LS-203 "Employee's Claim for Compensation" with the Office of Workers' Compensation Programs on February 2, 2006, alleging right shoulder and neck injuries resulting from a work-related accident in June 2003, in which the Claimant ran into an I-beam. CX 2, EX 25. An informal conference was held on June 1, 2006. CX 17. The Employer did not file a Notice of Controversion, but instead took the position that the Claimant had never informed it of an injury occurring on June 1, 2003, and was therefore not entitled to medical treatment or compensation. CX 17. The Claimant submitted a Form LS-18 "Pre-Hearing Statement" on February 19, 2009, in which it stated an amended accident date of September 27, 2003. CX 19. This case was referred to the Office of Administrative Law Judges for a hearing on February 27, 2009. CX 18. The Claimant submitted a second pre-hearing statement on September 8, 2009. The Employer

submitted its own pre-hearing statement on September 23, 2009, in which it argues in part that the Claimant has failed to both give timely notice of injury under Section 12 and establish entitlement to medical benefits under Section 7.

Timely Notice of the Injury

Section 12 of the Longshore Act provides that written notice of an injury must be given to the employer within 30 days after the claimant becomes aware or should have been aware of the relationship between the injury and his employment.[4] "Awareness" for purposes of Section 12 occurs when the claimant is aware, or should have been aware, of the relationship between the injury, the employment, and the disability.[5] In the absence of substantial evidence to the contrary, Section 20(b) of the Longshore Act presumes that the employer has been given sufficient notice of an injury.[6]

In this case, the Employer acknowledges that the Claimant suffered a workplace injury on September 27, 2003. Emp. Br. 51-52. The Employer does not dispute that it was advised that the Claimant had neck soreness and a cervical strain. Emp. Br. 52. The Employer argues, however, that the Claimant failed to give timely notice of his shoulder injury after becoming aware of its relationship to the September 2003 accident.

The Claimant testified that when he returned to work immediately following the September 2003 accident, his shoulder was "really strained" and bothering him. Tr. 24. He further noted that when he returned to work in November 2004 after his sinus surgeries, his shoulder became inflamed depending on his level of physical exertion. Tr. 25. He attributed the condition to the September 2003 accident. He testified, however, that it was not until February 2005 that he first realized that his shoulder condition would require him to leave work. Tr. 31. The Benefits Review Board has held that "awareness" under Section 12 of a relationship between injury and employment is "not necessarily on the date of the accident . . . [or] the last alleged trauma to claimant's overall condition."[7] Similarly, the Sixth Circuit has found that experiencing pain after an accident, particularly when the pain does not prevent the employee from working, does not put him on notice of a likely impairment so as to start the running of the limitations period.[8] As stated above, the Claimant testified that he did not first recognize the severity of his shoulder condition until February 2005. Tr. 31. Dr. Trinidad's orthopedic evaluation on February 11, 2005 supports this testimony. In his report, Dr. Trinidad noted that the Claimant reported shoulder pain that "increased with any attempts at overhead activity" and a "decreased ability to perform his normal everyday activities." CX 26, EX 3. It was after this examination that Dr. Trinidad

---

[4] 33 U.S.C. § 912(a).

[5] *Lopez v. Stevedoring Services of America*, 39 B.R.B.S. 85, 88 (2005) (citing, inter alia, *Ceres Gulf, Inc. v. Director, OWCP [Fagan]*, 111 F.3d 17 (5th Cir. 1997) and *Bath Iron Works Corp. v. Galen*, 605 F.2d 583 (1st Cir. 1979)).

[6] 33 U.S.C. § 920(b); *see also Bustillo v. Southwest Marine, Inc.*, 33 B.R.B.S. 15, 16 (1999).

[7] *Lopez*, 39 B.R.B.S. at 88.

[8] *Paducah Marine Ways v. Thompson*, 82 F.3d 130, 134-35 (6th Cir. 1996); *see also Galen*, 605 F.2d at 586 (holding that under Section 12 "there is little purpose in penalizing a claimant for not reporting a pain he reasonably did not believe would impair his earning power").

recommended shoulder surgery. Therefore, based on the Claimant's testimony and Dr. Trinidad's report, I find that the Claimant first became aware of the full extent of his injury, and its relationship to the September 2003 accident, on February 11, 2005.

The Claimant was thus required to deliver written notice of his injury to the Employer within 30 days after February 11, 2005.[9] The Claimant testified that he last spoke with the Employer in February 2005 and notified them that he could not continue working. Tr. 27. However, I have reviewed the entire record and find no evidence that the Claimant gave written notice of his injury to the Employer in February 2005. Instead, the first written notice was not made until the Claimant completed and signed a Form LS-201 "Notice of Employee's Injury or Death" on December 1, 2005. CX 1, EX 26. I initially note that the Claimant did not complete the Form LS-201 until more than 30 days after he became aware of the relationship between his shoulder injury and the September 2003 accident. For this reason, I find that the Claimant's notice was untimely on its face. In addition, the Employer did not receive the Form LS-201 until February 2006. EX 26. Accordingly, I also find that the notice was not timely delivered as required under Section 12. I therefore conclude that the Claimant failed to give timely written notice of his injury to the Employer.

Even if the Claimant's Form LS-201 had been timely delivered to the Employer, I would still conclude that it does not satisfy the notice requirements of Section 12. The form reported an accident date of June 2003. CX 1, EX 26. It does state that the Claimant had run into an I-beam near the coal chutes and had suffered neck and shoulder injuries. However, the Claimant provided a different accident date in his pre-hearing statement, where he alleged that the accident occurred on September 27, 2003. CX 19. I find that the evidence in the record, including the accident reports and treatment records, establish that the work-related accident at issue occurred on September 27, 2003, and not in June 2003. CX 3-8, CX 23. The Claimant also acknowledged at the hearing that the accident occurred in September 2003. Tr. 19. He does not provide an explanation anywhere in the record for this date discrepancy. For these reasons, I find that the Claimant's Form LS-201 "Notice of Employee's Injury or Death" states an incorrect date of injury. Furthermore, the Claimant's and Employer's accident reports from September 27, 2003, as well as the treatment records from Southern Ohio Medical Center, do not indicate that the Claimant suffered from, or even mentioned, any shoulder injury after the accident. CX 3-8, CX 23. I therefore find that the Form LS-201 did not provide sufficient notice to the Employer that the Claimant suffered a work-related shoulder injury on September 27, 2003.[10] The Claimant did not designate the correct accident date until his counsel completed a Form LS-18 "Pre-Hearing Statement" on February 19, 2009. CX 19. Because this was more than 4 years after the Claimant became aware of the relationship between his injury and the September 2003 accident, I find that *proper* notice of the injury was not timely made. Therefore, regardless of whether the LS-201 was timely delivered to the Employer, I

---

[9] *See* 33 U.S.C. § 912(a).

[10] *See generally Stark v. Washington Star Co.*, 833 F.2d 1025, 1028 (D.C. Cir. 1987) (holding that insufficient notice was given where the claimant did not notify the employer, or any medical personnel, of his belief that his injury was work-related).

conclude that the Claimant failed to give timely written notice of his injury to the Employer.

A claimant's failure to provide timely formal notice, however, will not bar his claim if the employer had knowledge of the injury during the filing period or was not prejudiced by the lack of formal notice.[11] In this case, the Employer argues that while it was aware of the September 2003 accident, it did not know until February 2009 that the Claimant had suffered a resulting shoulder injury. I find that this argument has merit. The Benefits Review Board has held that where an employer has knowledge of a work accident, but does not know of the resulting injury, the employer will not be considered to have had knowledge of a work-related accident under Section 12(d).[12] Upon review of the record, I find no evidence that the Employer was aware of the Claimant's work-related shoulder injury during the 30-day filing period that began on February 11, 2005. While the Claimant testified that he knew that he had injured his shoulder immediately after the September 2003 accident, Tr. 21-22, there is no evidence that he ever reported this injury to the Employer. To the contrary, the Claimant's injury report states that he hit his head, but does not provide any detail as to injury. CX 3. Similarly, a sore and stiff neck was the only injury listed in the accident reports completed by the Employer's terminal manager and superintendent. CX 4-8. In addition, the September 27, 2003 treatment records from the Southern Ohio Medical Center diagnosed a muscular strain in the neck, but did not mention any shoulder injury. CX 23. Furthermore, the deposition testimony of Drs. Hanzel and Trinidad reveal that the Claimant never informed either physician of the September 2003 accident, or any resulting shoulder injury or aggravation, during their treatment of him from 2003 to 2007. EX 8, 18. Dr. Hanzel reported that he was only informed of a shoulder injury caused by an auto accident in 1999 and a four-wheeler accident in 2005. EX 18. Dr. Trinidad based his assessment of the Claimant's injury solely on a 1998 work-related accident. CX 26, EX 3, EX 8.

Based on my review of the evidence, I find that the Employer did not become aware of the Claimant's shoulder injury until it received the Form LS-201 in February 2006. CX 1, EX 26. This was well after the expiration of the 30-day filing period that began in February 2005. In addition, as explained above, the form listed an incorrect accident date of June 2003. A correct accident date was not provided by the Claimant until February 2009. Thus, I find that the Employer did not have knowledge of any shoulder injury resulting from the September 2003 accident until February 2009, which was nearly four years after the expiration of the filing period. For these reasons, I conclude that the Employer did not have knowledge of a work-related shoulder injury during the 30-day filing period.[13]

---

[11] 33 U.S.C. § 912(d)(1)-(2); *Bustillo*, 33 B.R.B.S. at 16; *Addison v. Ryan-Walsh Stevedoring Co.*, 22 B.R.B.S. 32, 34 (1989).
[12] *Addison*, 22 B.R.B.S. at 35; *Kulick v. Continental Baking Corp.*, 19 B.R.B.S. 115, 118 (1986).
[13] *See id.*

The Claimant's failure to provide timely notice will also be excused unless the Employer can prove that it was prejudiced by the lack of formal notice.[14] Prejudice under Section 12(d)(2) is established where the employer provides substantial evidence that, due to the 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."[15] A conclusory allegation of prejudice or of an inability to investigate the claim when it was fresh is insufficient to meet the employer's burden.[16] The relevant time period for showing prejudice is the time between the Claimant's initial awareness of the relationship between his injury and employment, and the date proper formal notice was given.[17]

In this case, the Employer argues that it was prejudiced by the lack of timely notice because it "had no opportunity to evaluate the Claimant's physical condition, consider a Section 7 medical examination or take any further action to defend this claim." Emp. Br. 53-54. The Employer also notes that by the time it received notice, the Claimant had already undergone three shoulder surgeries. As a result, the Employer contends that it was unable to determine any causal connection between the shoulder injury and the accident on September 27, 2003. The Benefits Review Board has held that prejudice exists when an employer is not notified of an injury until several years after the work-related accident, since the employer is foreclosed from effectively investigating the circumstances surrounding the injury or providing medical services.[18] Similarly, the Ninth Circuit has held that where notice is not given until several months after the claimant underwent surgery to repair his injury, the employer is prejudiced because it cannot determine the extent to which a causal connection exists between the injury and the work-related accident.[19]

I initially note that the relevant time period during which the Employer must show prejudice is February 11, 2005 (the date the Claimant first became aware that his shoulder injury was related to the September 2003 accident) and February 19, 2009 (the date proper formal notice was delivered).[20] I have already found that proper notice of the September 2003 shoulder injury was not received until nearly 5.5 years after the accident occurred. In addition, the Claimant did not deliver such notice until nearly 4 years after the Claimant's shoulder surgeries, which were performed in 2005 and 2006. CX 25, 27, 29. These surgeries were performed to diagnose and resolve "right shoulder impingement syndrome," which is what caused the Claimant's shoulder pain. CX 27, 29. The deposition testimony of Drs. Hanzel and Trinidad reveals that neither physician had been informed of the September 2003 accident. Instead, Dr. Trinidad attributed the injury to a 1998 workplace accident, CX 25, EX 3, and Dr. Hanzel noted that the injury had been caused by an August 1999 auto accident and the January 2005 ATV accident. EX 8, 18. Based on this evidence, I find that the Claimant's shoulder injury

---

[14] 33 U.S.C. § 912(d)(2); *Bustillo*, 33 B.R.B.S. at 16; *Addison*, 22 B.R.B.S. at 34.
[15] *Bustillo*, 33 B.R.B.S. at 16.
[16] *Id.*; *Griffin v. BAE Systems/Norfolk Ship Repair, Inc.*, BRB No. 10-0253, slip op. at 3 (Aug. 30, 2010).
[17] *See Austin v. Weeks Marine, Inc.*, BRB No. 06-0588, slip op. at 6 (Mar. 28, 2007) (unpub.).
[18] *Addison v. Ryan-Walsh Stevedoring Co.*, 22 B.R.B.S. 32, 35 (1989).
[19] *See Kashuba v. Northwest Marine, Inc.*, 139 F.3d 1273, 1276 (9th Cir. 1998).
[20] *See Austin*, BRB No. 06-0588, slip op. at 6.

could have been caused by at least 4 separate incidents, including the September 2003 accident. Accordingly, I find that the Claimant's failure to give timely notice precluded the Employer from obtaining evidence to determine the extent to which the September 2003 accident caused, or did not cause, the Claimant's injuries.[21] Furthermore, because the Employer was not aware of any work-related shoulder injury until after the Claimant had undergone several corrective surgeries, I find that the evidence is sufficient to show that the Employer was not only prevented from participating in the Claimant's medical care, but was also effectively precluded from investigating the circumstances surrounding the Claimant's injury.[22] For these reasons, I conclude that the Employer was prejudiced by the Claimant's failure to provide timely notice of his shoulder injury.

Based on the evidence in the record, I find that the Claimant failed to timely notify the Employer of a shoulder injury that resulted from the work-related accident on September 27, 2003, as required by Section 12(a) of the Longshore Act. In addition, I find the evidence sufficient to show that the Employer not only lacked knowledge of the injury during the 30-day filing period, but was also prejudiced by the untimely notice. The Claimant's failure to give timely notice is therefore not excused under Section 12(d). For these reasons, I conclude that the Claimant is barred from asserting a claim for disability benefits under the Longshore Act.

Medical Expenses

Section 7(a) of the Act provides that "the employer shall furnish such medical, surgical, and other attendance or treatment . . . for such period as the nature of the injury or the process of recovery may require."[23] In general, the employer is responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury.[24] Unlike a claim for disability benefits, a claim for medical benefits under Section 7 is never time-barred.[25] Treatment is compensable even though it is due only partly to a work-related condition.[26] The Board has interpreted this provision broadly.[27] A claimant has established a prima facie case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition.[28] When determining whether the claimant has established a prima facie case, an Administrative Law Judge must evaluate the medical evidence and give regard to such

---

[21] *See, e.g., Kashuba*, 139 F.3d at 1276 (holding that an employer was precluded from producing evidence establishing a lack of causation where the employer did not receive notice of the claimant's injury until 6 weeks after the claimant had surgery).
[22] *See id.*
[23] 33 U.S.C. § 907(a); 20 C.F.R. §§ 702.401, 702.402 (2010).
[24] *Ingalls Shipbuilding, Inc. v. Director, OWCP*, 991 F.2d 163 (5th Cir. 1993); *Perez v. Sea-Land Services, Inc.*, 8 B.R.B.S. 130, 140 (1978).
[25] *Colburn v. General Dynamics Corp.*, 21 B.R.B.S. 219, 222 (1988).
[26] *Id.* at 258.
[27] *See, e.g., Dupre v. Cape Romaine Contractors, Inc.*, 23 B.R.B.S. 86, 94-95 (1989) (holding employer liable for modifications to claimant's house as medical expenses).
[28] *Turner v. Chesapeake & Potomac Tel. Co.*, 16 B.R.B.S. 255, 257-58 (1984).

factors as the credentials of the physicians, their status as treating or examining physicians, and the reasoning behind their opinions.[29]

In this case, the Claimant's testimony is the only evidence that specifically states that his shoulder injury was caused by or related to the work accident on September 27, 2003. The Claimant submitted the June 2009 medical report of Dr. Steven Newman, who noted a history of an "initial injury to the right shoulder girdle in 1997 following a work-incurred injury" and constant re-aggravation "through the last episode in 2004-2005 when arising up underneath an I-beam, being struck across the base of the cervical spine and right shoulder girdle." CX 10, EX 9. While the latter injury meets the description of what occurred in September 2003, I find that Dr. Newman's report and medical history is not supported by the evidence in the record. Dr. Newman based this injury history on the Claimant's own recollections and "extensive medical records." He noted, however, that the Claimant's "actual details of the recall are somewhat limited." CX 10, EX 9. In addition, I have found no medical evidence in the record to support the assertion that the Claimant had been struck in the right shoulder by the I-beam or suffered a shoulder injury on September 27, 2003. To the contrary, the Claimant's post-accident treatment records, as well as his own accident report, only indicate that he hit his head and suffered a neck injury. CX 3, CX 23, EX 3. The only other basis for Dr. Newman's injury history was the Claimant's own recollection, which Dr. Newman admitted was limited in details. CX 10, EX 9. For these reasons, I find that Dr. Newman's opinion regarding the Claimant's injury history lacks sufficient evidentiary support and is inconsistent with the medical evidence in the record. I therefore accord it little probative weight on the issue of whether the Claimant has established a prima facie case for compensable medical treatment.

The remaining relevant medical evidence makes no mention of a shoulder injury resulting from a workplace accident in September 2003. First, the medical records from the Claimant's post-accident treatment at the Southern Ohio Medical Center state that he was suffering from a muscular strain in his neck. CX 23, EX 14. There is no diagnosis of a shoulder injury. Similarly, the records of the Claimant's treating physicians, Drs. Hanzel and Trinidad, do not attribute his shoulder condition to the September 2003 accident. Dr. Hanzel testified at his deposition that he had nothing in his record regarding a shoulder injury suffered by the Claimant in September 2003. EX 18. Instead, he attributed the initial injury to the Claimant's automobile accident in August 1999 and a re-aggravation of the injury to the Claimant's January 2005 four-wheeler accident. EX 18. Since neither of these accidents was work-related, I find that Dr. Hanzel did not consider treatment to be necessary for any shoulder injury sustained from the work-related accident on September 27, 2003. Similarly, in his treatment notes from February 2005, Dr. Trinidad states that the Claimant's shoulder injury was caused by a 1998 work-related accident in which he fell while stepping off a barge. EX 8. He made the same finding in his March 2005 operative report, and stated in his January 2007 treatment notes that the shoulder problems "occurred secondary to an injury that he sustained back in 1998 while at work for the railroad." EX 8. At his

[29] *L.B. v. Lake Charles Food Products, LLC*, BRB No. 08-0572, slip op. at 6 (Oct. 29, 2008) (unpub.) (citing *Monta v. Navy Exchange Service Command*, 39 B.R.B.S. 104 (2005)).

deposition, Dr. Trinidad testified that when he examined the Claimant, "[t]he only thing he told me about was in 1998 ... he said specifically that was the injury [and] did not mention to me any other injuries whatsoever." EX 12. I find that while the 1998 accident was work-related, it is not the accident for which the Claimant is seeking benefits in this claim. Accordingly, I find that while Dr. Trinidad concluded that surgery was necessary for treatment of the Claimant's shoulder injury, he did not do so on the basis of the September 2003 accident.

Based on the records and testimony of the Claimant's treating physicians, as well the post-accident treatment records, I find that the Claimant has failed to show that a qualified physician indicated that treatment was necessary for a shoulder injury caused by the September 2003 accident. Instead, the medical evidence clearly demonstrates that the Claimant's physicians found that his condition was caused by other accidents in which he injured his shoulder. None of these accidents, however, are the basis for the present claim. For these reasons, I conclude that the Claimant has failed to establish a prima facie case for compensable medical treatment and is not entitled to medical benefits under Section 7 of the Longshore Act.

ATTORNEY FEES

Section 28 of the Longshore Act provides that an award of an attorney's fee is permitted only in cases in which the claimant is found to be entitled to benefits.[30] Since benefits are not awarded in this case, the Act prohibits the charging of any fee to the Claimant for services rendered to him in pursuit of the request for modification.

ORDER

The claim for benefits filed by the Claimant on February 2, 2006, is hereby DENIED.

Alice M. Craft

Alice M. Craft
Administrative Law Judge

[30] 33 U.S.C. § 928.

CERTIFICATE OF FILING AND SERVICE

I certify that the on January 14, 2011 foregoing Compensation Order was filed in the Office of the District Director, Eighth Compensation District, and a copy thereof was mailed on said date by certified mail to the parties and their representative at the last known address of each as follows:

Jason D Conley
1091 Bussey Rd.
Wheelersburg, OH 45694

Norkfolk Southern Corp.
914 Hayport Road
Wheelersburg, OH 45694

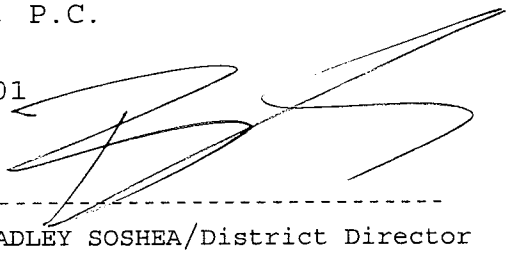
Norfolk Southern Railway Company
8000 Ravine's Edge Court
Suite 300-B
Columbus, OH 43235-5422

A copy was also mailed by regular mail to the following:

Office of Administrative Law Judges
Attn.: Judge Alice M. Craft
36 E. 7th. Street, Suite 2525
Cincinnati, OH 45202

O Bryan Law Firm, P.C.
Attn.: Christopher Kuebler
401 S. Old Woodward, Ste.450
Birmingham, MI 48009

Mason, Mason, Walker and Hedrick, P.C.
Attn.: Christopher Hedrick
11848 Rock Landing Drive, Ste. 201
Newport News, VA 23606



BRADLEY SOSHEA/District Director
Eighth Compensation District
U S DOL/OWCP/LHWCA

Mailed: January 14, 2011 mkj

If any compensation, payable under the terms of an award, is not paid within ten days after it becomes due, there shall be added to such unpaid compensation an amount equal to 20 percent thereof. The additional amount shall be paid at the same time as, but in addition to, such compensation.

The date compensation is due is the date the District Director files the decision or order in his office.