BRB No. 01-0462

LEA ANN GREGG	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
UNITED STATES MARINE CORPS/MWR	)	DATE ISSUED: Feb. 14, 2002
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Granting Motion for Summary Decision of David W. Di Nardi, Administrative Law Judge, United States Department of Labor.

Steven M. Birnbaum (Law Office of Steven M. Birnbaum), San Francisco, California, for claimant.

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

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

PER CURIAM:

Claimant appeals the Decision and Order Granting Motion for Summary Decision (2000-LHC-2676) of Administrative Law Judge David W. Di Nardi 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 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 alleged that she injured her back at work on February 1, 1994, and she filed a claim for disability and medical benefits for this injury on July 27, 1999. In a Decision and Order dated March 23, 1999, Administrative Law Judge Lesniak awarded claimant medical benefits for a work-related back injury sustained on October 15, 1993. Upon employer's motion for summary decision prior to the hearing, Administrative Law Judge Di Nardi (the administrative law judge) found claimant's claim for the alleged 1994 injury barred by the principles of *res judicata*, collateral estoppel, and election of remedies. Alternatively, the administrative law judge found the later claim barred by Sections 12 and 13 of the Act, 33 U.S.C. §§912, 913. Consequently, the administrative law judge granted employer's motion for summary decision and denied claimant's disability and medical benefits claim for her 1994 injury.

On appeal, claimant challenges the administrative law judge's granting of employer's motion for summary decision and the denial of her claim for disability and medical benefits. Employer responds in support of the administrative law judge's decision.

Propriety of Granting Employer's Motion for Summary Decision

Claimant contends that the administrative law judge erred in granting employer's motion for summary decision because the doctrines of *res judicata*, collateral estoppel, and election of remedies are inapplicable and because there are genuine issues of material fact with regard to whether she was excused from providing timely written notice under Section 12 and whether her claim is timely filed under Section 13. Any party may move for summary decision, at least twenty days before the hearing. 29 C.F.R. §§18.40, 18.41. Summary decision is appropriate where there is no genuine issue as to any material fact, such that the moving party is entitled to judgment as a matter or law. *See Brockington v. Certified Electric, Inc.*, 903 F.2d 1523 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991); *Hall v. Newport News Shipbuilding & Dry Dock Co.*, 24 BRBS 1 (1990). To defeat a motion for summary decision, the party opposing the motion must establish the existence of a genuine issue of material fact, which is defined as a fact which affects the outcome of the litigation. *See Dunn v. Lockheed Martin* Corp., 33 BRBS 204 (1999); *Hall*, 24 BRBS at 4. In determining the propriety of a summary decision, the administrative law judge must draw all reasonable inferences in favor of the party opposing the motion. *See Brockington*, 903 F.2d 1523; *Dunn*, 33 BRBS at 207. Based on our holdings below, employer is not entitled to judgment as a matter of law as claimant has established genuine issues of material fact concerning whether her failure to provide timely written notice was excused under Section 12 and whether she timely filed her claim under Section 13. Moreover, we hold that claimant's claim for her 1994 injury is not barred by the doctrines of *res judicata*, collateral estoppel, and election of remedies. Therefore, we vacate the administrative law judge's granting of

employer's motion for summary decision and remand this case to the administrative law judge for the holding of an evidentiary hearing, 29 C.F.R. §18.41(b), and for further consideration consistent with this opinion.

Res Judicata

Claimant initially contends that the administrative law judge erred in finding her claim barred by the doctrine of *res judicata* because she filed two separate and distinct claims. The application of *res judicata* or claim preclusion requires a showing of the following three elements: 1) a final judgment on the merits in an earlier suit; 2) an identity of the cause of action in both the earlier and later suits; and 3) an identity of the parties or their privies in the two suits. *Keith v. Aldridge*, 900 F.2d 736, 739 (4th Cir.), *cert. denied*, 498 U.S. 900 (1990), *citing Nash County Bd. of Educ. v. Biltmore Co.*, 640 F.2d 484, 486 (4th Cir.), *cert. denied*, 454 U.S. 878 (1981).

In the instant case, the administrative law judge denied claimant's claim for disability and medical benefits arising from a 1994 injury based on the principle of *res judicata* because he found that it could have been brought with her earlier claim for the 1993 injury. The administrative law judge reasoned that claimant was aware of the 1994 injury at the time of the 1998 hearing before Administrative Law Judge Lesniak but failed to raise the 1994 injury at the that hearing.

We reverse the administrative law judge's finding that *res judicata* precludes claimant's claim for the 1994 injury. Contrary to the administrative law judge's finding, *res judicata* is inapplicable as there is no identity of the cause of action in the earlier and later proceedings. As claimant correctly argues, her earlier claim was for medical benefits for a 1993 work-related back injury, whereas the claim at issue in the instant case is for disability and medical benefits for a 1994 work-related back injury. "[T]he appropriate inquiry is whether the new claim arises out of same transaction or series of transactions as the claim resolved by the prior judgment." *Hartnett v. Billman*, 800 F.2d 1308, 1313 (4th Cir. 1986), *cert. denied*, 480 U.S. 932 (1987); Restatement (Second) of Judgments §24. In this case, the claim for a 1994 back injury stems from a different work accident than the claim for the medical benefits for the 1993 back injury. This lack of identity of the claims thus precludes application of *res judicata*.[1] *See Meekins v. United Transportation Union,* 946 F.2d 1054 (4th Cir.

[1]It is correct that, under the doctrine of *res judicata*, when a final judgment has been entered on the merits of a case:

it is a finality as to *the claim* or demand *in controversy*, concluding parties and

1991). That claimant may have been aware of her right to assert a claim for the 1994 injury at an earlier time is relevant to the provisions of Sections 12 and 13 of

---

> those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.

Guinness PLC v. Ward, 955 F.2d 875, 893-894 (4th Cir. 1992), *citing Cromwell v. County of Sac*, 94 U.S. 351, 352 (1876); *see* Restatement (Second) of Judgments §§24-25. Thus, where a party seeks to refile the same claim, the second claim is precluded as to both issues actually litigated and those which might have been litigated. However, the administrative law judge here overlooked the requirement of an identity of claims, and instead created a rule which required that claimant raise a new claim for another injury in the prior adjudication because she became aware of the second injury while the prior claim was pending. As the two claims lack the requisite identity, *res judicata* cannot apply. Moreover, the procedure created by the administrative law judge is not consistent with the Act's regulations, which provide the administrative law judge the discretion to consider new issues but do not require that he do so. *See* 20 C.F.R. §702.336.

the Act, but that alone is not a basis to apply *res judicata* and find the present claim is precluded by operation of the judgment in the earlier claim. Consequently, we reverse the administrative law judge's finding that the claim for the 1994 injury is barred by the doctrine of *res judicata*.

Collateral Estoppel

Claimant next contends that the administrative law judge erred in finding her claim barred by the doctrine of collateral estoppel because her disability and medical benefits claim does not involve the same issue as her previous claim for medical benefits.[2] Collateral estoppel, or issue preclusion, is applied when: 1) the issue sought to be precluded is identical to one previously litigated; 2) the issue was actually determined in the prior proceeding; 3) the issue was a critical and necessary part of the judgment in the prior proceeding; 4) the prior judgment is final and valid; and 5) the party against whom estoppel is asserted had a full and fair opportunity to litigate the issue in the previous forum. *See Sedlack v. Braswell Services Group, Inc.*, 134 F.3d 219 (4th Cir. 1998); *Plourde v. Bath Iron Works Corp.*, 34 BRBS 45 (2000); *see also* Restatement (Second) of Judgments §27.

In the instant case, the administrative law judge denied the later claim for disability and medical benefits based on the principle of collateral estoppel because he found that the issue to be determined was inconsistent with the previous decision that claimant's entitlement to medical benefits was due to a 1993 injury. The administrative law judge reasoned that Administrative Law Judge Lesniak rejected Dr. Henrickson's opinion that claimant's 1994 injury may have increased her pain and that claimant previously maintained that her back problems were due to a 1993 injury, and thus he found that claimant cannot now seek an inconsistent ruling that Dr. Henrickson's opinion is correct and that it is her 1994 injury which caused her back problems.

---

[2]In his decision addressing claimant's medical benefits claim for her 1993 injury, Administrative Law Judge Lesniak stated the issue to be resolved was whether claimant continues to require further medical care and treatment for a work injury of October 15, 1993, and whether employer was liable for medical treatment from March 1996 to present. Ex. B to Emp. Ex. 1 at 2, 16.

We reverse the administrative law judge's finding that the instant claim is barred by the doctrine of collateral estoppel because the same issues are not involved in both cases. The previous issue, which was actually litigated, was claimant's entitlement to medical benefits due to a 1993 injury. The present issue is claimant's entitlement to disability and medical benefits as a result of a 1994 injury. Thus, since the issue of whether claimant is entitled to disability and medical benefits as a result of a 1994 injury was not actually litigated before Administrative Law Judge Lesniak, the doctrine of collateral estoppel does not bar this action.[3] *See Sedlack,* 134 F.3d 219; *Figueroa v. Campbell Industries,* 45 F.3d 311 (9th Cir. 1995); *Formoso v. Tracor Marine, Inc.*, 29 BRBS 105 (1995); *Kollias v. D&G Marine Maintenance*, 22 BRBS 367 (1989), *rev'd on other grounds*, 29 F.3d 67, 28 BRBS 70(CRT)(2d Cir. 1994), *cert. denied*, 513 U.S.1146 (1995).

Election of Remedies

Claimant also contends that the administrative law judge erred in finding her claim barred by the doctrine of election of remedies because she filed claims for successive remedies arising from two separate injuries, and did not seek two recoveries for the same injury. The election of remedies doctrine precludes a litigant from pursuing a remedy which, in a prior action, she rejected in favor of a simultaneously available alternative remedy. *Landry v. Carlson Mooring Serv.*, 643 F.2d 1080, 1087, 13 BRBS 301, 306-307 (5th Cir.), *cert. denied,* 454 U.S. 1123 (1981); *Munguia v. Chevron, U.S.A., Inc.*, 23 BRBS 180 (1990), *aff'd on recon. en banc*, 25 BRBS 336 (1992), *aff'd on other grounds,* 999 F.2d 808, 27 BRBS 103(CRT)(5th Cir. 1993), *cert. denied*, 511 U.S. 1086 (1994). The doctrine of election of remedies "refers to situations where an individual pursues remedies that are legally or factually inconsistent." *Alexander v. Gardner-Denver Co.,* 415 U.S. 36, 49 (1974). Generally, the doctrine will not apply where there is no risk of double

[4]While the doctrine of collateral estoppel does not bar consideration of this claim, in addressing the merits of the claim, collateral estoppel effect would apply to any findings of fact made by Administrative law Judge Lesniak which are common to both the 1993 and 1994 claims and which were fully litigated and necessary to the judgment in the prior proceeding, unless such findings are modified pursuant to Section 22 of the Act, 33 U.S.C. §922.

recovery. *Dionne v. Mayor & City Council of Baltimore,* 40 F.3d 677, 681 (4th Cir. 1994). The election of remedies doctrine may apply where there are alternative remedies under different federal laws. *See Artis v. Norfolk & Western Ry. Co.*, 204 F.3d 141, 34 BRBS 6(CRT)(4th Cir. 2000)(FELA award barred subsequent longshore claim for the same injury based on the election of remedies doctrine). The election of remedies doctrine does not apply to bar simultaneous or successive claims for the same injury under the Act and under a state act, due to the crediting of one recovery against the other. *See Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 12 BRBS 828(CRT) (1980); *Service Eng'g Co. v. Emery*, 100 F.3d 659, 30 BRBS 96(CRT) (9th Cir. 1996); *Munguia,* 23 BRBS 180; 33 U.S.C. §903(e).

In the instant case, the administrative law judge precluded claimant from bringing her disability and medical benefits claim based on a 1994 injury because it was inconsistent with the prior judgment that found claimant entitled to medical benefits based on a 1993 injury. The administrative law judge merely stated,

> The Claimant elected the remedy that her back condition is due to an October 15, 1993 injury. Now, the Claimant seeks a judgment that her back condition is due to a February 1, 1994 injury. Obviously, this would be an inconsistent finding and is barred by the doctrine of election of remedies, and I so find and conclude.

Decision and Order at 14. We reverse the administrative law judge's holding that the election of remedies doctrine bars claimant's claim. Claimant is not now seeking disability and medical benefits for a 1994 injury and contending that a 1993 injury for which she was found entitled to medical benefits did not occur. Rather, she is seeking disability and medical benefits for a 1994 injury after recovering medical benefits for a 1993 injury. Under the administrative law judge's analysis, all successive injury cases would be barred if claimant recovered for the first injury. Such a result is clearly inconsistent with the Act.[4] Thus, claimant's present claim is

[3]Moreover, the general credit doctrine precludes a double recovery in the case of successive injuries. *See generally Director, OWCP v. Bethlehem Steel Corp. [Brown]*, 868 F.2d 759, 22 BRBS 47(CRT) (5th Cir. 1989)*; Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (*en banc*); *see also Brady-Hamilton Stevedore Co. v. Director, OWCP*, 58 F.3d 419, 29 BRBS 101(CRT) (9th Cir. 1995).

not barred by the doctrine of election of remedies and the administrative law judge erred in so finding.

Sections 12 and 13

Claimant further contends that the administrative law judge erred in finding that her claim is barred by Section 12 because employer had knowledge of the 1994 injury on September 30, 1996, based on Dr. Henrickson's opinion reporting an injury in 1994. Thus, she contends, her failure to provide timely written notice of the 1994 injury is excused under Section 12(d)(1) based on employer's knowledge of the injury. With regard to Section 13, claimant contends that the administrative law judge erred in finding that her claim is barred by Section 13 because employer never filed a first report of injury pursuant to Section 30(a), 33 U.S.C. §930(a), despite its knowledge of claimant's 1994 injury. Because employer had knowledge of the 1994 injury in 1996 and did not file a Section 30(a) report, claimant contends that the statute of limitations is tolled under Section 30(f). Thus, claimant asserts that her claim is timely.

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). Pursuant to Section 20(b) of the Act, 33 U.S.C. §920(b), it is presumed that claimant's notice of injury and claim for benefits were timely filed. *Shaller v. Cramp Shipbuilding & Dry Dock Co.*, 23 BRBS 140 (1989). The administrative law judge found claimant's claim for her 1994 injury barred by Sections 12 and 13 because claimant was aware of the relationship between her injury and employment on September 30, 1996, the date of Dr. Henrickson's report, and did not give timely written notice within 30 days or file a claim within one year of that date. The administrative law judge further found that claimant's failure to give timely notice was not excused because employer was prejudiced by the late notice as it was led to believe by claimant that her need for medical care was due to a 1993, and not a 1994, work injury.

We affirm the administrative law judge's finding that claimant was aware of the relationship between her 1994 injury, employment and disability on September 30, 1996, the date of Dr. Henrickson's report. In that report, Dr. Henrickson stated that, "Consistent with this history of a cumulative trauma type of injury in January 1994, the report of January 21, 1994, indicates that [claimant] had developed severe back pain with starting inventory at

work." Ex. D to Emp. Ex. 1 at 3. In that same report, Dr. Henrickson also stated that claimant's symptoms in February 1994 were very different from the low back pain resulting from the October 15, 1993, injury and that she had significant increased pain related to lifting activities while performing inventory at work in January/February 1994. Ex. D to Emp. Ex. 1 at 3, 10. Moreover, claimant sought light-duty work from employer after the 1994 injury occurred. Thus, we affirm the administrative law judge's finding that claimant was aware or should have been aware on September 30, 1996, of the relationship between her injury, her employment and her disability, as it is supported by substantial evidence. *See Parker*, 935 F.2d 20, 27, 24 BRBS 98, 112(CRT); Decision and Order at 14-16; Ex. D to Emp. Ex. 1 at 3, 10.

We cannot, however, affirm the administrative law judge's finding that claimant's claim is barred because she did not timely file notice of her injury and a claim with reference to September 30, 1996. The administrative law judge did not give claimant the benefit of the Section 20(b) presumption, and thus require employer to produce substantial evidence that the notice of injury and claim for benefits were not timely filed. *See Shaller*, 23 BRBS 140. In this regard, the administrative law judge improperly applied Section 12(d), and failed to consider the applicability of the tolling provision of Section 30(f). Claimant's failure to provide timely written notice of injury pursuant to Section 12(a) is excused if employer had knowledge of the work-relatedness of the injury *or* if employer was not prejudiced by claimant's failure to give timely notice. 33 U.S.C. §912(d); *Boyd v. Ceres Terminals,* 30 BRBS 218 (1997); *Sheek v. General Dynamics Corp.*, 18 BRBS 151 (1986), *modifying on recon.* 18 BRBS 1 (1985). In the instant case, the administrative law judge addressed only prejudice to employer, and did not address whether employer had knowledge of the 1994 injury such that claimant's lack of timely notice is excused. *See* Decision and Order at 14-15. Thus, we must remand this case for further findings on this issue.

"Knowledge" under Section 12(d)(1) generally requires that the employer know of the work-relatedness of the claimant's injury; such may be imputed to the employer if it knows of the injury and of facts that would lead a reasonable person to conclude that compensation liability is possible. *See Stevenson v. Linens of the Week,* 688 F.2d 93, 14 BRBS 304 (D.C. Cir. 1982); *Williams v. Nicole Enterprises*, *Inc.*, 19 BRBS 66 (1986). "Actual knowledge" is deemed to exist if the employee's immediate supervisor is aware of the injury. 20 C.F.R. §702.216; *see Boyd,* 30 BRBS at 221. In the instant case, there is evidence that employer had knowledge of the work-relatedness of claimant's 1994 injury in 1994 when she reported the injury to her manager immediately after it occurred, Emp. Ex. 4 at 45 (claimant's deposition), and went to employer's occupational health clinic on March 3, 1994, seeking medical treatment for this injury. Emp. Ex. 3 at 20, 42. Additionally,

employer arguably may have had knowledge of the injury on September 30, 1996, based on Dr. Henrickson's 1996 report of a history of a cumulative trauma in 1994 and significantly increased pain related to claimant's lifting activities while performing inventory at work in 1994, Ex. D to Emp. Ex. 1 at 3, 10, and/or on August 30, 1998, when Dr. Henrickson testified that claimant suffered an injury at work in 1994. August 20, 1998, Tr. at 80. On remand, the administrative law judge must determine the weight to be accorded to this and any newly admitted evidence, and make findings of fact regarding employer's knowledge of claimant's injury under Section 12(d)(1), with employer bearing the burden of producing substantial evidence that it did not have knowledge. 33 U.S.C. §920(b).

In addition to the administrative law judge's failure to apply Section 12(d) correctly, the administrative law judge did not address Section 30(f) which tolls the Section 13 filing period under specified circumstances. In order to rebut the Section 20(b) presumption, employer must first establish that it complied with the requirements of Section 30(a), or that it never gained knowledge of claimant's injury. Section 30(a) provides in pertinent part:

> Within ten days from the date of an 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 of 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 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 Blanding v. Director, OWCP*, 186 F.3d 232, 33 BRBS 114(CRT) (2d Cir. 1999); *Ryan v. Alaska Constructors, Inc.*, 24 BRBS 65 (1990). Thus, for Section 30(a) to apply, the employer must have notice of the injury or knowledge of the injury and its work-relatedness, as under Section 12(d); the employer may overcome the Section 20(b) presumption by presenting substantial evidence that it never gained knowledge of the injury. *See Blanding*, 186 F.3d 232, 33 BRBS 114(CRT); *Stark v. Washington Star Co.*, 833 F.2d 1025, 20 BRBS 40(CRT) (D.C. Cir.1987); *Stevenson*, 688 F.2d 93, 14 BRBS 304; *Steed v. Container Stevedoring Co.*, 25 BRBS 210 (1991); *Kulick v. Continental Baking Corp.*, 19 BRBS 115 (1986). Because the same standard applies under both Sections 12(d)(1) and 30(a), the administrative law judge should apply his findings under Section 12(d) to Section 30(a). If employer had knowledge of claimant's

injury and did not filed a Section 30(a) report, claimant's claim is timely as a matter of law. 33 U.S.C. § 930(f).

In sum, we hold the administrative law judge improperly granted employer's motion for summary decision, as he erred in applying the law. *See Dunn,* 33 BRBS 204; 29 C.F.R. §§18.40-18.41. The doctrines of *res judicata,* collateral estoppel, and election of remedies are inapplicable in this case. Moreover, the administrative law judge did not fully consider the excusing and tolling provisions of Sections 12(d) and 30(f). *See Bustillo v. Southwest Marine, Inc.*, 33 BRBS 15 (1999). Thus, we vacate the administrative law judge's decision granting employer's motion for summary decision and remand the case to the administrative law judge for consideration of these issues. On remand, the administrative law judge should allow the parties to complete the evidentiary development of the record in this case. *See generally Wayland v. Moore Dry Dock*, 21 BRBS 177 (1988); 20 C.F.R. §§702.338, 702.339. If, on remand, the administrative law judge finds the lack of timely notice excused and the claim timely filed, he must consider all remaining issues raised by the parties.

Accordingly, the administrative law judge's Decision and Order Granting Motion for Summary Decision is vacated, and the case is remanded for further consideration consistent with this decision.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge