92446-5

Court of Appeals No. 71526-7-I

BEFORE THE WASHINGTON STATE COURT OF APPEALS
DIVISION ONE

DENNIS WILLHITE,
Appellant

vs.

FARMERS INSURANCE (FARMERS NEW WORLD LIFE INSURANCE COMPANY),
Respondent

On Appeal from the King County Superior Court
KCSC Case No. 12-2-23827-8SEA

APPELLANT'S PETITION FOR SUPREME COURT DISCRETIONARY REVIEW

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Appellant Dennis Willhite ("Willhite") hereby requests Supreme Court review of the August 10, 2015 decision of Division One affirming the jury verdict of December 19, 2013. App. Ex. 1. Reconsideration of this decision was denied on September 4, 2015. App. Ex. 2.

I. ISSUES PRESENTED FOR REVIEW

1) Are an employer's duties under the Washington Family Leave Act ("WFLA") and the federal Family and Medical Leave Act ("FMLA") nondelegable?

2) Can an employer avoid liability under the Washington Law Against Discrimination ("WLAD") on the grounds that it delegated its duties under the WFLA and FMLA to a third party administrator?

3) When an employer contracts with a third party to administer employee disability claims under the WFLA and FMLA, does an agency relationship arise between the third party administrator and the employer?

4) Does an employer have knowledge of an employee's disability for purposes of the WLAD when it has notice that that employee took a three month disability leave of absence due to a serious health condition?

5) Is it error to add an additional element of proof to the disparate treatment pattern instruction that requires the plaintiff to prove that the employer had actual knowledge of the employee's disability before the jury can consider whether the disability was a substantial factor in the termination decision?

6) Is it error to exclude from evidence an employer's post termination explanation for its termination decision and to refuse to instruct the jury that it is permitted to infer discrimination if it finds the explanation to be unworthy of belief?

7) Is a plaintiff preventing from arguing his theory of the case when the court refuses to instruct on the circumstances from which discrimination can be inferred and instructs the jury that the plaintiff must prove that the employer had actual knowledge of the disability.

8) Can a plaintiff who has been employed with the same company for 32 years and who has a bachelor's degree in accounting testify to his own lost salary, benefits and pension income?

9) When an employer includes a formal severance plan as part of an employee benefits package, can it thereafter condition payment of the benefit on a release of liability?

10) Is a plaintiff entitled to judgment as a matter of law when an employer's termination decision is based solely on an assessment of skills that are compromised by the disability?

RAP 13.4 (b) provides that a petition for review will be accepted by the Supreme Court: (1) if the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; (2) if the decision of the Court of Appeals is in conflict with a decision of another division of the Court of Appeals; (3) if a significant question of law under the

Constitution of the State of Washington or of the United States is involved; or, (4) if the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

As will be established herein, Willhite respectfully submits that good cause exists for this Court to grant this petition for review under subdivisions (1), (3) and (4).

II. STATEMENT OF THE CASE

Willhite had been employed at Farmers New World Life's ("Farmers") for 31 years when he began to suffer symptoms of anxiety and depression in late 2008/early 2009. In the 31 years prior to his depression, Willhite received consistently positive performance reviews, regular raises and promotions. His personnel file is devoid of a single disciplinary or derogatory remark. Willhite's first and only "less than favorable" review is dated December 2009 – months after the onset of his symptoms. During this time, Willhite advised human resources of his mental state and his intention to seek medical attention. By May 2010, Willhite's condition was diagnosed as acute and he was placed on a three month medical leave of absence.

Thirteen weeks after his return from disability leave, Willhite was terminated in connection with a company-wide layoff. Employees were selected for termination based solely upon a "matrix" that included a subjective assessment of skills in areas such as "initiative," "teamwork,"

and "communication," along with a number value assigned to the prior three years' performance reviews. The skills assessment was based entirely upon the prior 12 month period between October 2009 to September 2010. It is undisputed that Willhite was suffering from depression during the entirety of this time period and, in fact, was on medical leave for three of the twelve months. Prior to his depression, Willhite excelled in all areas assessed on the matrix, often "exceeding expectations." Eight weeks after returning from disability leave, Willhite's manager assessed Willhite's performance of these skills over the prior year. While all other employees received an average rating of "8," Willhite scores ranged from 1-3. His total skills ranking score was 12. The scores of his peers were almost four times higher, at an average of 47. This score sealed Willhite's fate, irrespective of any value placed on his prior three years' performance reviews, and he was selected for termination.

At the time of his termination, Willhite was fifteen months shy of eligibility for early retirement at the highest level of pension benefits. This suit for disability discrimination followed.

At trial, Willhite offered the report of Dr. Laura Don, a consulting psychiatric physician hired by Liberty Mutual, Farmers' disability claims administrator. The report found that Willhite suffered from a "significant psychiatric impairment" that compromised the performance of all of the

skills measured by the matrix. Dr. Don conditioned Willhite's return to work on Farmers' providing certain accommodations regarding Willhite's work environment.

Farmers claims that it never received the report of Dr. Don. In fact, Farmers claims that it had no idea that Willhite was suffering from any kind of disability. This "plausible deniability" argument is based up on Farmer's retention of Liberty Mutual to administer its employee disability claims. Farmers testified that employees are instructed to contact Liberty Mutual with all issues having to do with disability claims and that Liberty Mutual handles those claims "top to bottom." Farmers claims that, as a result of this retention, it is provided no information whatsoever regarding the nature or status of an employee's disability claim. Although it was copied on letters from Liberty Mutual approving Willhite's disability leave due to a "serious health condition," the director of human resources testified dismissed the import of this information as "stock language" and that he had no "inkling" of his disability.

The court refused to find an agency relationship between Liberty Mutual and Farmers, despite testimony from Farmers that it contracted with Liberty Mutual to carry out its obligations under the medical leave laws. Based upon this ruling, the court excluded the Dr. Don report – which revealed not only the nature of the disability, but the way in which it affected the skills measured by the matrix.

Willhite requested that the court instruct the jury with the pattern disparate treatment instruction. Farmers objected to the pattern instruction on the grounds that it is too "plaintiff friendly" in that it does not require Willhite to prove that Farmers' had actual knowledge of Willhite's disability. Contrary to all applicable law and over Willhite's strenuous objections, the trial court added the following language to the instruction:

> "Where an employer did not know or had no notice of an employee's disability, the employee's disability ***cannot have been a substantial factor*** in the employment decision (emphasis added)."

Although this language was borrowed from the accommodation instruction that permits a finding of constructive notice, the court refused to give a constructive notice instruction here.

Willhite requested that the jury be instructed on the circumstances from which discrimination can be inferred, such as the temporal proximity between the disability and the termination, a termination decision based solely upon a subjective assessment, a precipitous drop in performance or the employer's post termination explanation that is unworthy of belief. The court refused all instructions.

Throughout the course of the trial, the jury was inundated with testimony that no one at Farmers had any idea that Willhite had a disability. Despite being copied on letters from Liberty Mutual

referenced Willhite's "disability leave," one member of human resources testified that he had no idea that Willhite's leave was even medically related. In a written question to Matt Crook, Farmers' head of human resources, on juror asked: "For clarification was there any knowledge of the plaintiff's disability before the termination?" Crook responded: "We knew he was on leave for that time frame, yeah. We didn't know why, "we" being the HR team, nor the manager, only that he was on leave."

During closing, Farmers made eight separate references to its lack of knowledge and pointed to the "unanimous testimony that no one was told of Mr. Willhite's depression or his anxiety." With the modified instruction adding notice as an element, Farmers told the jury that the testimony regarding Farmers lack of knowledge mandated a defense verdict:

> No one, as I have said repeatedly, no one at Farmers Life knew he had depression. It could not have been a significant motivating factor in Farmers Life's decision to lay him off when no one knew. RP (Dec. 18 Bowman Closing) 155:6-10.

After hearing this argument, the jury was presented with the modified instruction that it could not find a substantial factor if it did not find that Farmers had actual notice of the disability. Given a record replete with Farmers' denied knowledge, the jury had no choice but to find that Farmers' did not have knowledge of Willhite's disability. Because this was a threshold question on the verdict form, Willhite's

discrimination claim was defeated without the jury ever answering the question of whether the disability was a substantial factor in the termination decision.

Although the Court of Appeals affirmed the verdict in an unpublished opinion, the consequences of its decision are not limited to Willhite. Farmers employs 22,000 people - 1,000 of which of are Washington State. Zurich, Farmers' parent company, employs 60,000 people. Like all large companies, Farmers is no stranger to discrimination claims. What sets this case apart, and why review here is critical, is Farmers' openly antagonistic view of the laws against discrimination and its unabashed determination circumvent its protections.

The modification to the disparate treatment instruction was based solely upon two unpublished decisions and Farmers concedes that it is unable to produce any authority supporting the amendment. Yet Farmers knew that if the pattern instruction was used, the jury would find that it had notice of Willhite's disability when it learned of his disability leave. Indeed, Farmers previously litigated and lost on the very same notice argument advanced in this case. *See Regby ex rel. Ownes v. Farmers Ins. Exchange,* 107 Wn.App. 1039 (2001)(holding that notice of intent to seek disability leave is notice of the disability). Farmers' response to *Regby* was not to heed the decision but, rather, attack the problem from another angle. This came in the form of the retention of Liberty Mutual and

Farmers' newly minted "plausible deniability" defense. By affirming the verdict, the Court of Appeals placed its legal stamp of approval on this defense and, essentially, bestowed on Farmers immunity from liability on an entire category of disability discrimination claims.

III. ARGUMENT

A. FARMERS CANNOT SHIELD ITSELF FROM LIABILITY THROUGH ITS RETENTION OF LIBERTY MUTUAL

Pursuant to fundamental principles of agency law, Liberty Mutual was acting as Farmers' agent when carrying out Farmers' obligations under the medial leave laws. Restatement (Second) of Agency § 214 (1958), App. Ex. 6; *Goodman v. Boeing Co.,* 75 Wn.App. 60, 85-86 (1994). Any finding to the contrary would impermissibly permit Farmers to delegate to Liberty Mutual its duties under the medical leave laws.

As a result of the agency relationship, Liberty Mutual's knowledge of Willhite's disability is imputed to Farmers. *Goodman,* 75 Wn.App. at 85-86; Restatement (Third) of Agency §5.03 (2006), App. Ex. 3; Restatement (Second) of Agency §272 (1958) App. Ex 5; *Derocher v. Crescent Wharf & Warehouse* BRB 83-2484 (1985)(PMA, employer's third party benefits administrator is its agent and its knowledge is imputed to employer), App. Ex. 7; *Steed v. Container,* 25 BRBS 210 (1991)(third party benefits administrator for employer/stevedoring company is agent of employer giving rise to imputed knowledge), App. Ex. 9; *Bustillo v.*

Southwest, 33 BRBS 15 (1999)(notice to the employer's claims administrator was imputed to the employer), App. Ex. 8. This rule is designed to prevent a principal from asserting the very defense that Farmers asserts here. Restatement (Third) of Agency §5.03 cmt. b (2006), App. Ex. 4.

B. THE JURY INSTRUCTIONS WERE AN ERRONEOUS STATEMENT OF THE LAW

RCW 49.60.180 makes it unlawful to terminate an employee "because of" a disability. This standard is met upon a showing that the disability was a "substantial factor" in the termination decision. *Mackay v. Acorn Custom Cabinetry, Inc.*, 127 Wn.2d 302, 310-11 (1995). The plaintiff's burden of proof is set forth in pattern instruction WPI 330.32. The employer's knowledge regarding the disability ***is not a separate element of proof***. This is because knowledge is easily (and usually) denied while a discriminatory motive, and therefore knowledge, can be inferred from the circumstances surrounding the termination. *Hill v. BCTI, Income Fund-I,* 144 Wn.2d 172, 179-80 (2001).

1. Addition of a Notice Element Violated the Legislative Mandate for a Liberal Construction of WLAD

The WLAD contains a legislative mandate for its liberal construction and all interpretations of the statute must further the legislative goal of eliminating discrimination. *Dean v. Municipality of Metropolitan Seattle-Metro,* 104 Wn.2d 627, 632 (1985); *Holland v.*

Boeing, 90 Wn.2d 384, 388-89 (1978). It is impermissible to read into the WLAD additional elements of proof that would serve to narrow its protections and any instruction that serves to create an additional burden of proof constitutes reversible error. *Lodis v. Corbis Holdings, Inc.,* 172 Wn.App. 835, 848-49 (2013); Johnson *v. Chevron U.S.A, Inc.,* 159 Wn.App. 18, 33 (2010); *Svendgard v. State,* 122 Wn.App.670, 675-76 (2004); *Mackay,* 127 Wn.2d at 310-12.

The notice language added to the pattern instruction was based solely upon two unpublished opinions and the pattern instruction for a claim arising out of a failure to accommodate. Ironically, the unpublished opinions cited by Farmers stand for the proposition that an employer can have constructive notice of a disability. This is consistent with the authority in accommodation cases, which provides that an employer has notice of a disability once it becomes aware of the employee's "serious health condition." *Sommer v. Department of Social and Health Services,* 104 Wn.App. 160, 173 (2001); *Bachelder v. American West Airlines, Inc.,* 259 F.3d 112, 1130 (2001); *Xin Liu v, Amway,* 347 F.3d 1125, 1134 (2003). Despite this authority and despite its reliance on the accommodation instructions in support of the modification to the disparate treatment instruction, the court refused to instruct the jury on constructive notice. The added notice language served to "qualify" the circumstances under which the jury could find a substantial factor and eliminated its

ability to infer discrimination from circumstantial evidence. This was an impermissible comment on the evidence that deprived Willhite of the ability to argue his theory of the case. *State v. Woldegiorgis,* 53 Wn.App. 92, 94 (1988)(holding that embellishment of pattern instruction constitutes unwarranted comment on the evidence).

Here, the trial court's ruling that added an additional burden of proof to WPI 330.32 was not a liberal construction of the WLAD nor did it apply exceptions narrowly. To the contrary, the ruling created an exception so wide that it served to swallow whole the protections that the statute was created to provide.

2. Willhite Was Prevented From Arguing That Discrimination Could be Inferred From a Termination Decision Based upon Performance Deficits Related to the Disability

If a termination decision is based upon performance deficits related to depression, the jury is entitled to conclude, *based upon this evidence alone*, that the disability was a substantial factor in the termination decision. *Gambini v. Total Renal Care, Inc.,* 486 F.3d 1087, 1093-95 (2007). If evidence is presented on this issue, it is reversible error to not instruct the jury that it may find discrimination based upon solely upon such a finding. *Gambini,* 486 F.3d at 1093-95. In *Reihl v. Foodmaker, Inc.,*152 Wn.2d 138, 145 (2004), the court held that comments about changes in the plaintiff's personality, suggesting that he was not the same

as the "old Mark" or that he was becoming more like the "old Mark" were sufficient to give rise to liability for a termination decision based upon the symptoms of depression. *Riehl,* 152 Wn.2d at 152.

Here, all of the skills measured by the matrix were affected by Willhite's depression. However, the jury was instructed that it ***could not*** infer discrimination from the assessment without first finding that Farmers' had actual knowledge of the disability. This was reversible error.

3. Willhite was Prevented From Arguing That Discrimination Could be Inferred From a Post-Termination Explanation That is Questionable

The law provides that a jury can find discrimination based solely upon an employer's post termination explanation that is of questionable credibility because the jury is entitled to infer that the explanation is part of a cover up. *Hill,* 144 Wn.2d at 184-85; *Sellsted v. Washington Mutual Savings Bank*, 69 Wn.App. 852, 861-64 (1993); *Riehl,* 152 Wn.2d at 151-53. After the termination, Farmers wrote the Human Rights Commission with an explanation for its termination decision. The explanation was not only inconsistent with other versions, the letter contained affirmative misrepresentations regarding Farmers investigation into the matter. The trial court excluded the letter and refused to instruct the jury on inferences that can be drawn from an employer's post termination explanation.

4. Willhite Was Prevented From Arguing That Discrimination Could be Inferred From Circumstances Surrounding the Termination

A jury is entitled to infer discrimination from the proximity between the disability-related conduct and the termination or a dramatic drop in performance just prior to termination. *Wilmot v. Kaiser Aluminum & Chem. Corp.*, 118 Wn.2d 46, 69 (1991); *Kimbro v. Atlantic Richfield Co,* 889 F.2d 869, 875 (9th Cir. 1989); *Xin Liu;* 347 F.3d at 1137.[1] Discrimination can also be inferred when the termination decision is based upon subjective performance evaluations such as those measuring "dedication," or "enthusiasm." *Xin Liu,* 347 F.3d at 1136-37. Willhite requested that the court instruct the jury on these circumstances, which request was denied. Farmers claims that Willhite could have simply "argued" the theories on which the court refused instructions. However, these are the very theories that the notice language served to extinguish as they were all conditioned upon a prior finding of actual notice.

C. WILLHITE IS ENTITLED TO JUDGMENT AS A MATTER OF LAW ON LIABILITY UNDER THE WLAD AND WFLA

Farmers admits that its termination decision was based solely on the matrix. It is undisputed that the Willhite's disability compromised all of the skills measured by the matrix. Because Farmers' only defense to

1 Federal court decisions interpreting the Civil Rights Act of 1964 are persuasive authority in Washington. *Xieng v. Peoples Bank of Washington,* 120 Wn.2d 512, 518 (1993).

this claim is that it was unaware of the disability and because knowledge is imputed as a matter of law, judgment should be entered in favor of Willhite.

D. THE ORDER OF SUMMARY JUDGMENT SHOULD BE REVERSED AND VACATED

After his termination, Willhite received a severance payment. Because Willhite did not to sign a release, Farmers demanded that he return the payment. Willhite refused. The trial court entered an order of summary judgment in favor of Farmers on its unjust enrichment claim and judgment was entered in the amount of the severance, on the grounds that the severance was conditioned upon a release of liability. This ruling was reversible error.

In order to establish a cause of action for unjust enrichment, it must be shown that the person allegedly enriched did not provide value for the benefit at issue. *Young v. Young,* 164 Wn.2d 477, 484 (2008). Here, the severance was, pursuant to Farmers own description, an employee benefit. Benefits are not "gifts," but rather compensation under the law. *Flower v. TRA Industries*, 127 Wn.App. 13, 34 (2005); WPI 330.81. When Farmers conditioned receipt upon signing a release, it did not lay the frame work for unjust enrichment but, rather, an adhesion contract. *Townsend v. Quadrant Corp.,* 153 Wn.App. 870,883-84 (2009).

E. THE COURT'S RULINGS ON DAMAGE INSTRUCTIONS AND EVIDENCE WERE ERROR

The law presumes that a plaintiff has sufficient personal knowledge of his or her own income and property to testify to its value without the aid of experts. *McInnis & Co. v. Western Tractor & Equip.* Co., 67 Wn.2d 965, 968-69 (1966); *McCurdy v. Union Pac R. Co*, 68 Wn.2d 457, 468 (1966); *Ingersol v. Seattle-First Nat. Bank,* 63 Wn.2d 354, 358-59 (1963); *Tiegs v. Watts,* 135 Wn.2d 1, 18 (1998). This rule is equally applicable to testimony of lost income in employment cases. *Consolidated Maxfield v. Sinclair Intern.*, 766 F.2d 788 (1985 3rd Cir)(holding no expert testimony required when plaintiff relies on salary history to calculate front pay and no expert needed to reduce amount to present value); *Donlin v. Philips Lighting North America Corp.* 581 F.3d 73, 81-82 (3rd Cir. 2009). As such, Willhite should have been permitted to testify to his lost income, benefits and pension, based upon his 32 year history.

IV. CONCLUSION

The WLAD is a reflection of our state's "disdain" for discrimination and our commitment to ensure its complete eradication. RCW 49.60.010; WAC 162-16-200(1); *Mackay,* 127 Wn.2d at 309. Interpretations of the law that reduce its protections to mere rhetoric are to be rejected. *Mackay,* 127 Wn.2d at 310 (1985); *Marquis v. City of*

Spokane, 130 Wn.2d 97, 109 (1996). The interpretations by the trial court, affirmed on appeal, should not be allowed to stand.

Dated: October 5, 2015

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APPENDIX

1. August 10, 2015 unpublished opinion of Division One.
2. September 4, 2015 order denying reconsideration.
3. *Rigby ex rel. Owens v. Farmers Ins.*, 107 Wn.App.1039 (2001)
4. Restatement (Third) Of Agency § 5.03 (2006)
5. Restatement (Second) of Agency § 272 (1958)
6. Restatement (Second) of Agency § 214 (1958)
7. *Derocher v. Crescent Wharf & Warehouse* BRB 83-2484 (1985)
8. *Bustillo v. Southwest*, 33 BRBS 15 (1999)
9. *Steed v. Container*, 25 BRBS 210 (1991)

Appendix 1

RICHARD D. JOHNSON,
Court Administrator/Clerk

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August 10, 2015

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CASE #: 71526-7-I
Dennis Willhite, Appellant v. Farmers Insurance et al, Respondents
King County, Cause No. 12-2-23827-8 SEA
Counsel:

Enclosed is a copy of the opinion filed in the above-referenced appeal which states in part:

"Affirmed"

Counsel may file a motion for reconsideration within 20 days of filing this opinion pursuant to RAP 12.4(b). If counsel does not wish to file a motion for reconsideration but does wish to seek review by the Supreme Court, RAP 13.4(a) provides that if no motion for reconsideration is made, a petition for review must be filed in this court within 30 days. The Supreme Court has determined that a filing fee of $200 is required.

In accordance with RAP 14.4(a), a claim for costs by the prevailing party must be supported by a cost bill filed and served within ten days after the filing of this opinion, or claim for costs will be deemed waived.

Should counsel desire the opinion to be published by the Reporter of Decisions, a motion to publish should be served and filed within 20 days of the date of filing the opinion, as provided by RAP 12.3 (e).

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

ssd

Enclosure

c: The Honorable Kenneth L. Schubert

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DENNIS WILLHITE, Appellant, v. FARMERS NEW WORLD LIFE INSURANCE COMPANY, a Washington corporation, Respondent, ZURICH AMERICAN INSURANCE COMPANY, a corporation, Defendant.	)	DIVISION ONE No. 71526-7-I UNPUBLISHED OPINION FILED: August 10, 2015

DWYER, J. — After his employment was terminated, Dennis Willhite filed suit against his former employer, Farmers New World Life Insurance Company (Farmers), claiming, among other things, that he had been fired in violation of the Washington Law Against Discrimination (WLAD), chapter 49.60 RCW, and the Washington Family Leave Act (WFLA), chapter 49.78 RCW. Farmers denied all of Willhite's claims and asserted counterclaims based on Willhite's refusal to return his severance benefits, including a counterclaim of unjust enrichment. Following discovery, Farmers moved for and was granted summary judgment on its unjust enrichment counterclaim. Subsequently, Willhite's remaining claims were tried to a jury. The jury returned a defense verdict and judgment was

entered against Willhite. Willhite now assigns error to the manner in which the trial court instructed the jury, certain evidentiary rulings made by the court, and the grant of summary judgment on Farmers' claim of unjust enrichment. Finding no error, we affirm.

I

Willhite began working at Farmers in 1978. He worked in the company's marketing department in Los Angeles. After several years in that position, he transferred to Farmers' Mercer Island office, where he took a position in the actuarial department. He later moved to "operations" before ultimately rejoining the marketing department.

At some point in 2008 or 2009, Willhite began experiencing symptoms of depression and anxiety. By 2010, his symptoms had grown worse and, in May of that year, Willhite was diagnosed with acute anxiety and depression by Dr. Luba Kihichak. Dr. Kihichak prescribed medication and counseling. Willhite sought counseling from Dr. Richard Wemhoff on several occasions.

Willhite requested short term disability leave from his job pursuant to both the Federal Family and Medical Leave Act (FMLA) and the WFLA. His request was approved by Liberty Mutual, a company which administered Farmers' leave policies, as well as its short and long term disability benefits plans. Liberty Mutual provided Willhite's medical records to its consulting physician, Dr. Laura Don, for review. Dr. Don initially concluded that Willhite's records did not support a finding of significant psychiatric impairment. However, after receiving additional records from Dr. Kihichak and Dr. Wemhoff, Dr. Don determined that

the information available to her supported a finding of "significant psychiatric impairment from 5/18/10-8/7/10."

Liberty Mutual notified Farmers that Willhite's request for FMLA leave had been approved due to Willhite's "serious health condition." However, Liberty Mutual did not share Willhite's medical records or Dr. Don's reports with Farmers.

Days prior to Willhite's leave request, his supervisor, Brian Fitzpatrick, had contacted Farmers' human resources (HR) department for guidance on disciplining Willhite. According to his supervisors, Willhite had not been performing his job in a satisfactory manner. HR advised Fitzpatrick to give Willhite a formal warning. However, because Willhite went on leave, Fitzpatrick did not take action at that time.

Willhite returned to work on August 12, 2010. He did not share with anyone at Farmers the reason for his leave of absence. Fitzpatrick met with Willhite shortly after he returned from leave. At that meeting, Fitzpatrick gave Willhite a written summary of job expectations; Fitzpatrick did not give Willhite a formal warning. By the middle of September, Fitzpatrick again felt that Willhite was not performing in a satisfactory manner.

In September, Farmers advised its managers of its decision to lay off 84 employees. Employee assessment scores were prepared by Farmers' managers, including Fitzpatrick, in preparation for the scheduled layoff. Willhite received low assessment scores. On November 10, 2010, Willhite's employment was terminated.

Willhite believed that his termination was age-related. He filed an age

discrimination claim with the Equal Opportunity Commission, which was transferred to the Washington State Human Rights Commission (HRC) for investigation. Angie Bechtel, a Farmers HR consultant, was charged with responding to the HRC investigation. By letter, Bechtel advised the HRC that Farmers had conducted an internal investigation regarding Willhite's termination and had determined that Farmers had complied with all state and federal laws against discrimination. Bechtel explained that Willhite had been terminated due to poor performance.

On July 13, 2012, Willhite filed suit against Farmers in King County Superior Court. He pleaded claims of breach of implied contract, violation of the WFLA, age discrimination, disability discrimination, breach of the implied covenant of good faith and fair dealing, and wrongful discharge in violation of public policy. Farmers removed the case to federal court on September 5. On March 29, 2013, Willhite filed an amended complaint in which he excised the allegation that his termination was motivated in part by Farmers' desire to reduce its pension obligation. On April 18, the case was remanded to King County Superior Court.

In its answer to the amended complaint, Farmers denied all of Willhite's claims; Farmers also asserted counterclaims based on Willhite's refusal to return his severance benefits, including a counterclaim of unjust enrichment. Following discovery, Farmers moved for summary judgment on all of Willhite's claims and on its counterclaims. Willhite moved for summary judgment on his breach of implied contract claim.

The trial court granted Farmers' motion with respect to Willhite's claims of age discrimination and wrongful discharge in violation of public policy, and granted Farmers' motion with regard to its unjust enrichment counterclaim. Summary adjudication as to the remainder of the claims was denied.

Willhite's remaining claims—disability discrimination, violation of the WFLA, and breach of contract—were tried to a jury. The jury returned a verdict in favor of Farmers. On January 13, 2014, the trial court entered judgment; on February 3, the court entered an amended judgment, in which it supplemented the judgment with an award of taxable fees and costs in favor of Farmers.

Willhite appeals both from the grant of summary judgment in favor of Farmers on its unjust enrichment claim, and from the jury verdict and judgment entered against him. However, his breach of contract claim is not at issue on appeal. Thus, the claims at issue are Willhite's claims of disability discrimination and violation of the WFLA, as well as Farmers' claim of unjust enrichment.

II

Willhite asks that we vacate the jury's verdict and either enter judgment in his favor or remand for a new trial. His request for relief is predicated, broadly speaking, on his position that the trial court failed to instruct the jury properly and prevented him from presenting to the jury important evidence in the form of exhibits and witness testimony. For the reasons given herein, we reject his contentions and deny him relief.

The WLAD makes "it . . . an unfair practice for an employer to refuse to hire, discharge, or discriminate in compensation based on a person's sensory,

mental, or physical disability." Riehl v. Foodmaker, Inc., 152 Wn.2d 138, 144-45, 94 P.3d 930 (2004). The WLAD supports a cause of action for at least two different types of discrimination: (1) failure to accommodate, and (2) disparate treatment. Riehl, 152 Wn.2d at 145. Willhite alleges only disparate treatment. Thus, his claim is that Farmers "discriminated against [him] because of [his] condition." Riehl, 152 Wn.2d at 145.

In order to carry his ultimate burden of persuasion, Willhite was required to prove that "a discriminatory intent was a substantial factor" in Farmers' decision to terminate his employment. Riehl, 152 Wn.2d at 149. "A 'substantial factor' means that the protected characteristic was a significant motivating factor bringing about the employer's decision." Scrivener v. Clark Coll., 181 Wn.2d 439, 444, 334 P.3d 541 (2014). However, "[i]t does not mean that the protected characteristic was the sole factor in the decision." Scrivener, 181 Wn.2d at 444; see also Mackay v. Acorn Custom Cabinetry, Inc., 127 Wn.2d 302, 310, 898 P.2d 284 (1995) (rejecting the "determining factor" standard in favor of the "substantial factor" standard).

A

Willhite asserts that the trial court erred in instructing the jury. According to Willhite, these were errors of both commission and omission. He is incorrect.

Jury instructions are sufficient if they permit each party to argue its theory of the case, are not misleading, and, when read as a whole, properly inform the jury of the applicable law. Leeper v. Dep't of Labor & Indus., 123 Wn.2d 803, 809, 872 P.2d 507 (1994). "When these conditions are met, it is not error to

refuse to give detailed augmenting instructions, nor to refuse to give cumulative, collateral or repetitious instructions." Bodin v. City of Stanwood, 130 Wn.2d 726, 732, 927 P.2d 240 (1996). Errors of law in jury instructions are reviewed de novo. Hue v. Farmboy Spray Co., 127 Wn.2d 67, 92, 896 P.2d 682 (1995). A refusal to give a proposed jury instruction is reviewed for abuse of discretion. Boeing Co. v. Key, 101 Wn. App. 629, 632, 5 P.3d 16 (2000).

i

Willhite takes issue with the following instruction given to the jury: "Where an employer did not know or had no notice of an employee's disability, the employee's disability cannot have been a substantial factor in the employment decision." Jury Instruction 18. He contends that this instruction imposed an improper element of proof regarding his disability discrimination claim, given that his burden was to show that his disability was a "substantial factor" in Farmers' decision to end his employment.[1] Yet, Willhite acknowledges that "notice is inherent in the substantial factor question." This acknowledgment reveals Willhite's true position: namely, that Farmers had notice of his disability as a

[1] Citing CR 51(f), Farmers maintains that Willhite failed to preserve for appellate review all but one of the objections to the jury instructions he now raises on appeal. Farmers points to the repeated response of "no objection" given by Willhite's counsel—when, prior to instructing the jury, the trial court read each proposed instruction and invited the parties to state their objections on the record—as proof that Willhite failed to preserve for review all but one objection. However, the jury instructions had been the subject of extensive debate throughout the trial and each error alleged by Willhite on appeal was considered by the trial court. Given a similar situation, our Supreme Court "reviewed the trial record, found 'extended discussions' about the jury instructions, and determined that the trial court understood the nature of [the] objection." Washburn v. City of Federal Way, 178 Wn.2d 732, 747, 310 P.3d 1275 (2013) (discussing Crossen v. Skagit County, 100 Wn.2d 355, 359, 669 P.2d 1244 (1983)). In this matter, the trial court undoubtedly understood the nature of Willhite's objections, given the extensive argument presented before and during the trial. Accordingly, the issues were preserved for review.

matter of law.[2]

Willhite asserts that notice was established as a matter of law because the knowledge of Liberty Mutual was imputed to Farmers. Notice was imputed, he maintains, as a result of the agency relationship between Liberty Mutual and Farmers. In taking this position, Willhite assumes that which he was required to prove—that an agency relationship did, in fact, exist.

It was Willhite's burden to establish the existence of an agency relationship. Moss v. Vadman, 77 Wn.2d 396, 403, 463 P.2d 159 (1969). To do so, it was incumbent upon him to show a "manifestation of consent" by Farmers that Liberty Mutual would act on Farmers' behalf and subject to its control, "with a correlative manifestation of consent" by Liberty Mutual that it would act on behalf and subject to the control of Farmers. Moss, 77 Wn.2d at 403. "Agency is generally a question of fact reserved for a jury unless the facts are undisputed or permit only one conclusion." Kelsey Lane Homeowners Ass'n v. Kelsey Lane Co., 125 Wn. App. 227, 236, 103 P.3d 1256 (2005). "To determine whether an agency relationship exists, a court must look at the spirit of the agreement between the parties." Kelsey Lane, 125 Wn. App. at 235-36.

Willhite never made a sufficient showing of agency in the trial court. Now, on appeal, he appears to assume that a contractual relationship is equivalent to an agency relationship. There is no basis in law for such an assumption. Kelsey

[2] In any event, we perceive Willhite's argument that notice is not a separate element of proof to be premised on a rhetorical preference that notice remain embedded within the "substantial factor" inquiry. This rhetorical preference does not entitle Willhite to appellate relief. Leeper, 123 Wn.2d at 809.

Lane, 125 Wn. App. at 235 ("An independent contractor is generally not considered an agent because the contractor acts in his own right and is not subject to another's control."). The cases relied upon by Willhite are not to the contrary. Goodman v. Boeing Co., 75 Wn. App. 60, 877 P.2d 703 (1994) (imputing knowledge where agency relationship was found to exist between contracting parties), aff'd, 127 Wn.2d 401, 899 P.2d 1265 (1995); Kimbro v. Atl. Richfield Co., 889 F.2d 869 (1989) (imputing knowledge where agency relationship was found to exist between supervisor and subordinate); Francom v. Costco Wholesale Corp., 98 Wn. App. 845, 991 P.2d 1182 (2000) (ruling that a reasonable trier of fact could find that an employee's report of sexual harassment to her supervisor gave the employer constructive knowledge of the alleged sexual harassment). Consequently, Willhite is incorrect in asserting that Farmers had notice of his disability by virtue of maintaining an agency relationship with Liberty Mutual.[3]

Moreover, the knowledge of Liberty Mutual was not imputed to Farmers by operation of the WLAD. There is no indication in the WLAD that the legislature meant to prevent an employer from contracting with a third party to administer leave policies and disability benefit plans for employees. That is to say, the legislature did not make the duty to administer leave policies and disability

[3] Because of this, the trial court did not, contrary to Willhite's assertion, err in excluding the reports of Dr. Don. By Willhite's own admission, the viability of his position with regard to the trial court's ruling on these reports is premised upon the existence of agency relationship between Farmers and Liberty Mutual—a relationship that he failed to prove was in existence. Moreover, Farmers did not, contrary to Willhite's argument, waive its opportunity to object to these reports, as shown in Farmers' April 13, 2015 motion to either strike a portion of Willhite's reply brief or, alternatively, supplement the record, which we grant as to the alternative relief requested.

benefit plans for employees non-delegable.

It was incumbent upon Willhite to persuade the jury that Farmers was, in fact, on notice of his disability when it terminated his employment. As shown by the jury's response on the special verdict form, Willhite failed to do so. Consequently, the jury could not have found that Willhite's disability was a substantial factor in Farmers' termination decision.

ii

Willhite next takes issue with several proposed instructions that were not given to the jury. He contends that the trial court erred in declining to instruct the jury on (1) constructive notice, (2) disability related performance deficits and personality changes, and (3) circumstantial evidence. We disagree. The trial court did not err.

Willhite requested that the jury be instructed on constructive notice. The trial court rejected this request.

> THE COURT: What her argument is, if I understand it, is that you want to be able to argue that Farmers based its decision to terminate him on conduct resulting from his disability without notice that there was actually disability causing the conduct, and I don't think that's the law. That's the narcolepsy example, that's the guy sleeping at his desk all day. "He is asleep again. I told him not to sleep. I was going to fire him if he kept sleeping. You are fired. He never told me he had narcolepsy. If he had, we would have worked something out."
>
> . . . .
>
> THE COURT: That's constructive knowledge, that's—I'm not going so far as constructive knowledge, but if you can say that they actually knew that he had a disability, or that he had notice, they had notice of a disability, then, I think you are okay.

Willhite asserts that he was entitled to an instruction on constructive

notice. The Washington case he cites in an effort to support his assertion is inapposite, as it involved a "failure to accommodate" claim, see Sommer v. Dep't of Soc. & Health Servs., 104 Wn. App. 160, 15 P.3d 664 (2001),[4] and the federal cases he relies upon did not involve the WLAD, see Xin Liu v. Amway Corp., 347 F.3d 1125 (9th Cir. 2003), and Bachelder v. Am. W. Airlines, Inc., 259 F.3d 1112 (9th Cir. 2001). No appellate relief is warranted.

Willhite proposed that the jury be instructed on disability related performance deficits and personality changes.

PLAINTIFF'S PROPOSED INSTRUCTION NO. 14

> The law makes no distinction between conduct caused by a disability and the disability itself. As such, you may conclude that Willhite's disability was a "substantial factor" in Farmers' termination decision, if you find that the decision was based in part upon performance deficits, personality changes or other symptoms that were a result of Willhite's depression.

The first sentence of this proposed instruction was, in fact, included in jury instruction 18. While the second sentence was not, the trial court did not abuse its discretion by refusing to instruct the jury in this manner. This is so because the second sentence suggests that the jury could find that Willhite's disability was a substantial factor in Farmers' termination decision in spite of the fact that Farmers had no notice of such disability. Riehl and related authority, see, e.g., Hume v. Am. Disposal Co., 124 Wn.2d 656, 880 P.2d 988 (1994), Callahan v. Walla Walla Hous. Auth., 126 Wn. App. 812, 110 P.3d 782 (2005), do not support

[4] Willhite notes that "[i]n defining disability," courts "do not distinguish between claims based on disparate treatment and those alleging failure to accommodate." Callahan v. Walla Walla Hous. Auth., 126 Wn. App. 812, 820, 110 P.3d 782 (2005). This fact is irrelevant: the issue of notice is distinct from the issue of what constitutes a disability.

such a proposition. Instead, these decisions clarify that, where an employer is on notice of an employee's disability, the employee may not evade liability by explaining its termination decision in terms of the employee's poor performance.

Willhite, in two proposed instructions, requested that the jury be instructed that it could infer discrimination based on circumstances.

PLAINTIFF'S PROPOSED INSTRUCTION NO. 15

> You may also consider the following when determining whether Willhite's disability was a substantial factor in Farmers' termination decision:
>
> 1) The proximity of time between the disability leave and the termination, as well as the years of employment prior to termination;
> 2) A prior history of satisfactory work performance.
> 3) Whether the performance evaluations upon which the termination decision was based contain subjective opinions, such as those assessing an employee's "dedication," or "enthusiasm."
> 4) Whether there was a drop in performance evaluation scores after the onset of the disability.

(Footnotes omitted.)

PLAINTIFF'S PROPOSED INSTRUCTION NO. 16

> When determining whether disability was a substantial factor in the termination decision, you may also consider whether Farmers' offered explanations for the termination decision are: 1) inconsistent; 2) unworthy of belief; 3) unsupported by facts; or 4) affirmatively false.
>
> If you disbelieve any of Farmers' offered explanation for Willhite's termination, you are entitled to infer discrimination from this evidence alone, and conclude that Willhite's disability was a substantial factor in Farmers' termination decision.

(Footnotes omitted.)

Both of these proposed instructions were, at best, detailed augmenting

instructions.[5] The trial court characterized them as more suitable for closing argument. Regardless, the court did not abuse its discretion in refusing to instruct the jury in this manner.

B

Willhite next contends that the trial court made a number of erroneous evidentiary rulings. However, the trial court did not abuse its discretion in making any of the challenged rulings.

The grant of a motion to exclude certain evidence "is addressed to the discretion of the trial court and should be reversed only in the event of abuse of discretion." Hizey v. Carpenter, 119 Wn.2d 251, 268, 830 P.2d 646 (1992). "'A trial court abuses its discretion when its decision or order is manifestly unreasonable, exercised on untenable grounds, or exercised for untenable reasons.'" Anfinson v. FedEx Ground Package Sys., Inc., 174 Wn.2d 851, 860, 281 P.3d 289 (2012) (quoting Noble v. Safe Harbor Family Pres. Trust, 167 Wn.2d 11, 17, 216 P.3d 1007 (2009)). "An appellant bears the burden to prove an abuse of discretion." Hernandez v. Stender, 182 Wn. App. 52, 58, 321 P.3d 1230 (2014).

---

[5] Jury Instruction 4 provided for the following:

> The evidence that has been presented to you may be either direct or circumstantial. The term "direct evidence" refers to evidence that is given by a witness who has directly perceived something at issue in this case. The term "circumstantial evidence refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case.
>
> The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.

Willhite asserts that the trial court abused its discretion in refusing to take judicial notice of an NIMH[6] report on depression that was offered by Willhite.[7] Yet, Willhite does not even suggest, let alone argue, that the NIMH report contains any "adjudicative fact." This alone makes his assertion untenable. See In re Disciplinary Proceeding Against Sanai, 177 Wn.2d 743, 753 n.3, 302 P.3d 864 (2013) ("ER 201(a) states that the 'rule governs only judicial notice of adjudicative facts,'" which are "'controlling or operative'" facts as opposed to "'background'" facts or, in other words, "'a fact that concerns the parties to a judicial or administrative proceeding and that helps the court or agency determine how the law applies to those parties.'" (quoting BLACK'S LAW DICTIONARY 669 (9th ed. 2009))). The trial court properly rebuffed Willhite's attempt to put on expert testimony without actually calling such an expert to testify.

Willhite next asserts that the trial court erred in limiting the scope of Dr. Kihichak's testimony. He states that "Dr. Kihichak was prepared to testify that the skills measured by the Matrix[8] were compromised by Willhite's depression and anxiety." Yet, there is no indication in the record that Willhite ever made an offer of proof so as to inform the trial court that Dr. Kihichak would present such

---

[6] National Institute of Mental Health.

[7] This report purports to explain what depression is and identifies signs, symptoms, causes, and methods of treatment.

[8] This refers to the assessment score system used by Farmers in determining which employees to layoff in 2010.

testimony.[9] Unsurprisingly, therefore, the trial court did not rule on this issue. Consequently, there was no error.[10] See Kysar v. Lambert, 76 Wn. App. 470, 490-91, 887 P.2d 431 (1995); ER 103(a)(2) (error may not be predicated on ruling excluding evidence unless substance of evidence was made known to the court).

Willhite next asserts that the trial court erred in excluding the letter written by Angie Bechtel to the HRC. However, the record reveals that the trial court did not, in actuality, exclude the letter. Tellingly, Farmers did not seek to have the letter excluded. Instead, it moved to exclude "testimony and argument relating to Angie Bechtel's investigation of [Willhite's] . . . charge of age discrimination." When the trial court stated, "I'm essentially granting [the motion]," it was, at most, excluding testimony and argument relating to Bechtel's investigation. Thus, Willhite's claim of error fails because, contrary to his assertion, there was no trial court ruling on the admissibility of the letter.

We affirm the decisions of the trial court and the judgment entered on the jury's verdict.[11]

---

[9] In his disclosure of possible primary witnesses, Willhite limited his statement concerning Dr. Kihichak to this: "Responding party's treating physician and treated him for anxiety and depression and recommended medical disability leave."

[10] The point of contention between counsel for Farmers and counsel for Willhite in the trial court was whether Dr. Kihichack would be allowed to testify about depression in general, as opposed to the specific depression she observed in Willhite. (Farmers' motion in limine); (Willhite's response to motion in limine).

[11] Consequently, we need not and do not consider the trial court's rulings with regard to Willhite's testimony concerning damages.

III

Willhite contends that the trial court erred in granting summary judgment on Farmers' claim of unjust enrichment. Farmers brought a claim for unjust enrichment after Willhite accepted a severance package, yet failed to meet the condition for receiving the accompanying benefits: namely, agreeing to release Farmers of all claims. While Willhite's briefing on this issue is cursory and does not clearly indicate the theory upon which he relies, he appears to argue that the severance package represented compensation, meaning that he was entitled as a matter of law to receive it without needing to satisfy any preconditions. We decline to grant him appellate relief.

"Unjust enrichment is the method of recovery for the value of the benefit retained absent any contractual relationship because notions of fairness and justice require it." Young v. Young, 164 Wn.2d 477, 484, 191 P.3d 1258 (2008). A claim based on unjust enrichment requires proof of the following elements: "(1) the defendant receives a benefit, (2) the received benefit is at the plaintiff's expense, and (3) the circumstances make it unjust for the defendant to retain the benefit without payment." Young, 164 Wn.2d at 484-85.

Willhite received a benefit from Farmers in the form of a severance package. This benefit was received at the expense of Farmers. Because receipt of the benefits was conditional and because Willhite failed to meet the condition—agreeing to release Farmers of all claims—it was unjust for Willhite to retain the benefits. Therefore, the trial court did not err in granting summary judgment in favor of Farmers.

Nevertheless, Willhite argues that the severance package represented compensation, citing to Flower v. T.R.A. Industries, Inc., 127 Wn. App. 13, 34, 111 P.3d 1192 (2005). Yet, that case could only be of use to Willhite in the event that he had already established that he was entitled to the severance package as a matter of law. However, he points to no evidence that he was entitled to receive the benefits contained in the severance package. As a result, he has not shown that it was impermissible for Farmers to impose a condition on his receipt of the severance package. Because Willhite retained the benefit and did not satisfy the condition, he was unjustly enriched at the expense of Farmers. Summary judgment was properly granted in favor of Farmers.

Affirmed.[12]

We concur:

[12] Willhite requests an award of attorney fees and costs on appeal pursuant to RCW 49.60.030(2) and RAP 18.1. He admits that his entitlement to such an award is predicated on prevailing on his WLAD claim. He has not prevailed on his WLAD claim; thus, his request is denied.

Appendix 2

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
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CASE #: 71526-7-I
Dennis Willhite, Appellant v. Farmers Insurance et al, Respondents

Counsel:

Enclosed please find a copy of the Order Denying Motion for Reconsideration entered in the above case.

Within 30 days after the order is filed, the opinion of the Court of Appeals will become final unless, in accordance with RAP 13.4, counsel files a petition for review in this court. The content of a petition should contain a "direct and concise statement of the reason why review should be accepted under one or more of the tests established in [RAP 13.4](b), with argument." RAP 13.4(c)(7).

In the event a petition for review is filed, opposing counsel may file with the Clerk of the Supreme Court an answer to the petition within 30 days after the petition is served.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

ssd

Enclosure

c: The Reporter of Decisions

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DENNIS WILLHITE, Appellant, v. FARMERS NEW WORLD LIFE INSURANCE COMPANY, a Washington corporation, Respondent, ZURICH AMERICAN INSURANCE COMPANY, a corporation, Defendant.	DIVISION ONE No. 71526-7-I ORDER DENYING MOTION FOR RECONSIDERATION

The appellant having filed a motion for reconsideration herein, and a majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

Dated this 4th day of September, 2015.

FOR THE COURT:

Dwyer, J.

Appendix 3

107 Wash.App. 1039

NOTE: UNPUBLISHED OPINION, SEE WA R GEN GR 14.1

Court of Appeals of Washington, Division 1.

James RIGBY, Bankruptcy Trustee for Renita R. OWENS and Virgil E. Owens, husband and wife, Respondents,

v.

FARMERS INSURANCE EXCHANGE, one of the **Farmers** Insurance Group of Companies, foreign insurers, Appellants.

No. 46575–9–I. | Aug. 6, 2001.

Appeal from Superior Court of King County, Docket No. 95–2–31958–1, judgment or order under review, date filed 04/14/2000; Kathleen J. Learned, Judge.

Attorneys and Law Firms

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Sidney J. Strong, Strong & Konat P.S., Kimberly A. Konat, Seattle, WA, for respondent(s).

Opinion

UNPUBLISHED OPINION

BECKER.

***1** This is the second appeal in this case involving an **employment discrimination** claim. The trial court entered an order dismissing the claim on summary judgment, and our decision in the first appeal reversed that order. The plaintiff employee proceeded to trial and won a verdict for $275,000 in damages. The defendant employer has appealed, essentially still arguing that the facts do not support the plaintiff's legal theories. The law has not changed, and the evidence adduced at trial was essentially the same as the evidence we relied on in our previous decision. We therefore affirm the judgment.

Renita Owens worked for **Farmers** Insurance Exchange as a claims adjuster for eight years. In 1994, **Farmers** terminated her. Owens sued **Farmers**. The trial court granted **Farmers**' motion for summary judgment and dismissed all of Owens' claims. On appeal, we held that Owens had alleged sufficient facts to show that she was suffering from severe depression at the time and that **Farmers** had discriminated against her on account of it. We also remanded for trial on her claim that **Farmers** violated the federal Family Medical Leave Act by denying her request for a medical absence.

Owens prevailed at trial on both claims. After the trial, **Farmers** made a motion for judgment notwithstanding the verdict.[1] The trial court denied **Farmers**' motion and **Farmers** appeals.

In reviewing a trial court's decision to deny such a motion, this court applies the same standard as the trial court. *Hizey v. Carpenter*, 119 Wn.2d 251, 271, 830 P.2d 646 (1992). A judgment notwithstanding the verdict is proper only when the court can find, "as a matter of law, that there is neither evidence nor reasonable inference therefrom sufficient to sustain the verdict." *Goodman v. Goodman*, 128 Wn.2d 366, 371, 907 P.2d 290 (1995) (quoting *Brashear v. Puget Sound Power & Light Co.*, 100 Wn.2d 204, 208–09, 667 P.2d 78 (1983)); *Hizey*, 119 Wn.2d at 271–72. A motion for a judgment notwithstanding the verdict admits the truth of the opponent's evidence and all inferences that can be reasonably drawn therefrom, and requires the evidence to be interpreted most strongly against the moving party and in the light most favorable to the opponent. *Goodman*, 128 Wn.2d at 371. **Farmers** relies on the evidence it presented contradicting Owens' version of events, and fails to recognize or apply the appropriate standard of review at this juncture.

DISABILITY DISCRIMINATION

In order to establish a claim for **disability discrimination** under RCW 49.60, a plaintiff must prove the existence of a **disability**, and **discrimination** by the employer because of that **disability**. The **discrimination** element is met by demonstrating that the employer took action against the employee because of his or her condition (disparate treatment), or failed to take steps reasonably necessary to accommodate the employee's **disability** (failure to accommodate). *Sommer v. Department of Social and Health Services*, 104 Wn.App. 160, 172–73, 15 P.3d 664 (2001). For a disparate treatment claim, the 'because of'

language means that the **disability** must have been a substantially motivating factor in the employer's decision. *Mackay v. Acorn Custom Cabinetry, Inc.* 127 Wn.2d 302, 310, 898 P.2d 284 (1995). **Farmers** claims that Owens did not give reasonable notice of her **disability**, an issue we addressed in our previous opinion. An appellate court 'will generally not make a redetermination of the rules of law which it has announced in a prior determination in the same case or which were necessarily implicit in such prior determination." *Lutheran Day Care v. Snohomish County,* 119 Wn.2d 91, 113, 829 P.2d 746 (1992) (quoting 15 *L. Orland & K. Tegland, Wash. Prac.,* Judgments sec.380 at 55–56 (4th Ed.1986)). Owens testified at trial to the same facts that we held to be legally sufficient in the first appeal. During the weeks before she was fired she told several supervisors that she was receiving counseling and that she was suffering from stress. On the morning she called in to request an emergency medical leave of absence she told one of the supervisors of her 'mental instability'. Within two days of that request, she mailed a doctor's note confirming that she was in treatment. The sufficiency of this evidence is the law of the case, and seeing no reason to revisit it, we once again hold it sufficient.

***2** The same considerations apply to **Farmers**' argument that Owens' **disability** was not a substantially motivating factor in its decision to terminate her. **Farmers** introduced considerable evidence tending to show that Owens was terminated for her failure to comply with the company's call-in policy. But failing to call in was not a violation of policy if **Farmers** had actually approved Owens' medical leave request. There was evidence that Owens did receive such approval. When Owens telephoned to request emergency medical leave, her supervisor responded that she should 'do what you have to do.' Although **Farmers** claims that any approval was for that day only, the jury was free to believe the other possible inference. Owens was listed on medical leave on the calendar for the rest of the week and her files were reassigned. Owens also submitted proof that **Farmers** was not consistent in terminating employees for violating the call-in policy. The evidence showed that other, non-disabled employees were not terminated immediately on the second day of failing to call in. A jury could therefore conclude that the alleged violation of the call-in policy was a pretext for firing Owens and that a substantial factor in the company's decision to get rid of her was to avoid having to deal with her depression. See *Hill v. BCTI Income Fund–I,* Wn.2d, 23 P.3d 440, 448 (2001)(when an employee establishes a prima facie case of **discrimination** and offers evidence from which a jury could conclude that the employer's explanation for its action is a pretext, judgment as a matter of law is ordinarily inappropriate).

Farmers further contends that the evidence was insufficient to support the jury's conclusion that **Farmers** failed to accommodate Owens. Once an employer is notified of an employee's **disability**, the law requires the employer to take positive steps to accommodate the **disability**. *Goodman v. The Boeing Co.,* 127 Wn.2d 401,408, 899 P.2d 1265 (1995). **Farmers** claims it was unable to accommodate Owens because she refused to disclose the nature of her **disability** and she failed to cooperate with **Farmers**' reasonable requests for information. But, again, this assertion disregards the evidence presented by Owens. She testified that she told one supervisor that she was feeling mentally unstable when she made her request for medical leave. She also claimed to have sent a doctor's note within a couple of days of her request. Nevertheless, no one at **Farmers** inquired about the nature of her **disability** before terminating her **employment**. **Farmers** relies heavily on the testimony from its own employees that no doctor's note ever arrived. But the attorney who Owens originally consulted testified that **Farmers** refused to reconsider the termination when provided with more detail about Owens' depression. The jury could have concluded that Owens co-operated adequately and that the company nevertheless failed to accommodate her.

FAMILY MEDICAL LEAVE ACT

The Family Medical Leave Act entitles employees to 12 weeks of leave during a 12 month period for a serious health condition. **Farmers** contends that the evidence was insufficient for the jury to find that Owens gave **Farmers** reasonable notice of her need for leave under the Act. The Act itself does not specify notice requirements, but federal regulations provide that when the need for leave is unforeseeable, notice should be given 'as soon as practicable'. 29 C.F.R. sec. 825.303. Such notice can be verbal but should be sufficient to notify the employer that the employee has a need qualifying her for leave under the Family Medical Leave Act, and should state the anticipated timing and duration of the leave. 29 C .F.R. sec. 825.302(c).

***3 Farmers** contends that because Owens failed to disclose the nature of her need for leave and failed to tell **Farmers** the expected duration of her leave, her acts cannot be construed as reasonable notice under the Act.

This argument fails for the same reasons discussed in connection with notice of **disability**. Owens testified that she told a supervisor of her mental instability when she called to request the emergency medical leave, but no one asked her at that time how long she expected to be gone. She also said that she told human resources personnel a few days later that although she did not know the exact duration of her leave, she thought it would be around eight to 12 weeks. **Farmers** appears to argue that Owens' communications cannot qualify as reasonable notice under the Act because she did not tell her supervisors in the same conversation what her **disability** was and the anticipated duration of the leave. **Farmers** cites no authority for the proposition that such formality is required, or that an employee must have sufficient knowledge of the law to volunteer an anticipated duration of leave when the employer does not ask. As we held in our previous opinion, the proof presented by Owens met her burden of providing notice under the Act.

An employer has the right to request medical certification under the Act. 29 C.F.R. sec. 825.305(b). **Farmers** contends that Owens forfeited her right to leave under the Act by failing to provide medical certification. As we previously observed, there was a factual dispute in the testimony. Owens claimed she initially sent documentation by way of the doctor's note. **Farmers** claimed it did not receive the note, and made a later request for medical certification to which Owens failed to respond. The jury obviously resolved the dispute in favor of Owens. The standard of review requires us to consider the evidence favorable to Owens, and we find it sufficient to establish her claim.

ATTORNEY FEE MULTIPLIER

Farmer contends that the trial court abused its discretion by awarding a 1.2 multiplier to the attorney fee award in Owens' case. Courts may apply a multiplier to attorney fee awards to compensate for the risk that the litigation would be unsuccessful and that no fee would be obtained, and when the quality of the work is exceptional. *Bowers v. Transamerica Title Ins. Co.*, 100 Wash.2d 581, 598–99, 675 P.2d 193 (1983). While it does not appear that the multiplier was unjustified, given that Owens' counsel took the case on contingency and incurred substantial risk, we are unable to review the issue absent the trial court's findings. See *Henningsen v. Worldcom, Inc.*, 102 Wn.App. 828, 832, 9 P.3d 948 (2000) (appellate court is unable to review an attorney fee award including a multiplier without findings and conclusions explaining the basis for a multiplier); see also *Mahler v. Szucs*, 135 Wn.2d 398, 435, 957 P.2d 632 (1998) (the trial court must enter findings of fact and conclusions of law supporting an award of attorney fees). Accordingly, as it does not appear that the trial court entered findings on this issue, we remand for entry of findings and conclusions sufficient to permit review of the multiplier.

***4** As Owens has prevailed in this appeal, she is entitled to attorney fees on appeal under RCW 49.48.030, RCW 49.60.030(2), 29 U.S.C. sec. 2617(a)(3), and 29 U.S.C. sec.2617(a)(1)(ii). On remand, the trial court should include fees for this appeal in the award of attorney fees it makes after entering findings.

The judgment is affirmed. The award of attorney fees is remanded for findings.

Parallel Citations

2001 WL 882183 (Wash.App. Div. 1)

Footnotes

1 Motions for judgments notwithstanding the verdict were renamed "motions for judgment as a matter of law" effective September 17, 1993. See *Litho Color, Inc. v. Pacific Employers Ins. Co.*, 98 Wn.App. 286, 298, 991 P.2d 638 (1999).

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Appendix 4

Restatement (Third) Of Agency § 5.03 (2006)

Restatement of the Law - Agency

Database updated March 2014
Restatement (Third) of Agency

Chapter 5. Notifications and Notice

§ 5.03 Imputation of Notice of Fact to Principal

For purposes of determining a principal's legal relations with a third party, notice of a fact that an agent knows or has reason to know is imputed to the principal if knowledge of the fact is material to the agent's duties to the principal, unless the agent

(a) acts adversely to the principal as stated in § 5.04, or

(b) is subject to a duty to another not to disclose the fact to the principal.

Comment:

a. Scope and cross-references. This section states the general principle that a principal is charged with notice of facts that an agent knows or has reason to know. Comment *b* examines the bases on which imputation is justified and the circumstances under which imputation is not relevant to or determinative of legal consequences. Comment *c* discusses imputation in the context of principals that are organizations. Comment *d* explores the range of situations in which imputation of notice to a principal affects the principal's legal relations. Comment *e* deals with the circumstances under which an agent may acquire knowledge of a fact or reason to know a fact. Comment *f* discusses when notice is imputed to a principal. Comment *g* explains that there is no "downward imputation" to an agent of notice of facts that a principal knows or has reason to know.

A notification given or received by an agent is effective as a notification given or received by a principal as stated in § 5.02. Section 1.04(4) defines "notice."

b. Justifications for imputation; limitations on relevance of imputation. A principal's agents link the principal to the external world for purposes of taking action, including the acquisition of facts material to their work for the principal. An agent undertakes to act on behalf of a principal; at the time the agent determines how to act, facts known to the agent at the time should guide the agent's determination of what action to take, if any. For further discussion, see § 1.01, Comment *e*; § 2.02, Comments *c* and *e*; and § 3.06, Comment *b*. An agent also has a duty, unless otherwise agreed, to use reasonable effort to transmit material facts to the principal or to coagents designated by the principal. See § 8.11. A principal's right to control an agent enables the principal to consider whether and how best to monitor agents to ensure compliance with these duties. A principal may not rebut the imputation of an agent's notice of a fact by establishing that the agent kept silent.

Imputation creates incentives for a principal to choose agents carefully and to use care in delegating functions to them.

Additionally, imputation encourages a principal to develop effective procedures for the transmission of material facts, while discouraging practices that isolate the principal or coagents from facts known to an agent. Notice is not imputed for purposes of determining rights and liabilities as between principal and agent. Thus, imputation does not furnish a basis on which an agent may defend against a claim by the principal.

Knowledge, including imputed knowledge, is not always determinative of, and sometimes is not even relevant to, certain claims and defenses. It is a matter of underlying substantive law, not agency law, whether knowledge, including imputed knowledge, forecloses a claim for relief or a defense against liability.

The nature of a principal's relationship or transaction with a third party may require performance by the third party under terms that provide no defense to the third party that is derived from imputation of an agent's knowledge. For example, if a principal makes a claim under a fidelity bond covering an employee's dishonesty, the issuer of the bond may not decline to pay on the basis that the employee's knowledge of the employee's own wrongdoing is imputed to the principal.

Imputation may provide the basis for a defense that may be asserted by third parties when sued by or on behalf of a principal. Defenses such as in pari delicto may bar a plaintiff from recovering from a defendant whose conduct was also seriously culpable. If a principal's agents fail to disclose or misstate material information to a third party who provides services to the principal, the agents' conduct may result in flawed work by the service provider. The agents' conduct may provide a defense to the service provider, if sued by or on behalf of the principal, on the basis that the agents' knowledge, imputed to the principal, defeats a claim that the principal relied on the accuracy of work done by the service provider. Subject to § 5.04, the agents' knowledge is imputed to the principal as a matter of basic agency law.

A principal may retain a service provider on terms or for tasks that make imputation of agents' knowledge irrelevant to subsequent claims that the principal may assert against the service provider. For example, a principal may retain a service provider to assess the accuracy of its financial reporting or the adequacy of its internal financial controls or other internal processes, such as its processes for reporting and investigating complaints of harassment in the workplace. If the service provider fails to detect or report deficiencies, the principal's claim against the service provider should not be defeated by imputing to the principal its agents' knowledge of deficiencies in the processes under scrutiny.

Imputation charges a principal with the legal consequences of having notice of a material fact, whether or not such fact would be useful and welcome. If an agent has actual knowledge of a fact, the principal is charged with the legal consequences of having actual knowledge of the fact. If the agent has reason to know a fact, the principal is charged with the legal consequences of having reason to know the fact. A principal may not rebut the imputation of a material fact that an agent knows or has reason to know by establishing that the principal instructed the agent not to communicate such a fact to the principal. Imputation thus reduces the risk that a principal may deploy agents as a shield against the legal consequences of facts the principal would prefer not to know.

Illustration:

Illustration:

1. P wants to sell goods to the government of country X but is concerned that payoffs may be necessary to effect such a sale. P employs A in country X and advises A that P does not wish to know of any commissions or other payments A may need to pay to effect the sale of P's goods. P may nonetheless be subject to liability for violations of anti-bribery laws. Notice may be imputed to P of A's knowledge of payments made by A.

Imputation is a doctrine that may carry severe consequences for a principal. For example, in situations comparable to Illustration 1, P may not defeat the imputation of A's knowledge by showing that P directed A to disclose to P any risk that payoffs might be made or by showing that A knew or suspected their occurrence but did not tell P. However, certain legal consequences may require a greater showing of culpability on the part of the principal, such as the knowledgeable involvement of higher-level agents. Additionally, an agent's knowledge of the agent's own conduct is not imputed to the principal when the conduct contravenes an unequivocal instruction furnished by the principal. Thus, if in Illustration 1 P directs A in unmistakable terms to make no illegal payments, A's knowledge of payments made is not imputed to P.

Imputation serves distinctive functions when an agent engages in transactions on behalf of a principal. In transactional settings, facts that agents know or have reason to know may be material to how the parties determine the price and terms on which they are willing to transact. If a principal may use an agent as a shield by claiming ignorance of facts known to the agent that are relevant to the terms of a transaction with a third party, the terms of the transaction to which the principal and the third party agree may differ from the terms to which they would have agreed were the principal not shielded from the agent's knowledge. By treating the principal as knowing material facts known to the agent, imputation encourages dealings that more fully reflect material facts. Imputation may also encourage a principal to direct its agent to reveal material facts to it because knowledge of these facts enables the principal to make an informed decision how to proceed. The principal may, for example, decide to abandon a transaction that has not yet been consummated, or to bargain for a lower price or for other terms that reflect the economic significance of the facts.

Pragmatic considerations also justify charging a principal with notice of facts that an agent knows or has reason to know. Most agents most of the time fulfill their duties, including the duty to disclose material facts to the principal or to coagents designated by the principal. See § 8.11. If both agent and principal deny that an agent transmitted knowledge of a particular fact, a third party may confront difficulties in proving otherwise. A similar pragmatic rationale underlies the doctrine of apparent authority, see § 2.03, Comment *c*.

In most cases in which imputation is an issue, the fact in question is one that a principal might well prefer not to know because knowing the fact will carry negative consequences for the principal in legal relations with third parties. A principal may, as in Illustration 1, explicitly encourage its agents to be reticent when they learn of such facts. A principal may also implicitly encourage reticence through the incentives it provides to agents and other mechanisms of control that the principal deploys. Imputation makes it unnecessary for a third party to establish collusion between principal and agent when an agent knows or has reason to know a material fact of which the principal claims ignorance.

It is a mixed question of fact and law whether an agent knows or has reason to know a particular fact. An agent knows a fact if the agent has actual knowledge of it. An agent has reason to know a fact when a reasonable person in the agent's position would infer the existence of the fact, in light of facts that the agent does know. Facts that an agent knows often affect how the agent understands what is observed.

Illustrations:

Illustrations:

2. P owns a residential property, Blackacre, and lists it for sale with A. A resides in the same neighborhood and knows that high winds periodically damage structures. P, who has never visited Blackacre, does not know this. On behalf of P, A enters into a contract to sell Blackacre to T, who does not know of the wind conditions. Applicable law requires that P disclose the existence of such conditions to T if they are known to P. Notice of the high-wind conditions, known to A, is imputed to P.
3. Same facts as Illustration 2, except that A denies knowing anything about wind conditions specific to Blackacre. A's knowledge of wind conditions in the neighborhood gives A reason to know that Blackacre may face comparable peril. Notice of the peril to Blackacre, which A has reason to know, is imputed to P.

Notice of a fact is not imputed to a principal unless the agent knows the fact or has reason to know it. This is so although the agent's failure to know the fact is the consequence of the agent's breach of a duty owed to the principal or to a third party. The agent's failure to know the fact, however, may cause the principal to breach a duty that the principal owes to a third party.

Illustration:

Illustration:

4. P lists a residential property, Whiteacre, for sale with A, directing A to handle all aspects of selling the property. A enters into a contract on P's behalf to sell Whiteacre to T. Unknown to P and A, Whiteacre is infested by wood-destroying insects. An applicable statute requires a seller of residential property to have it inspected to determine whether it is infested by wood-destroying insects. A does not inspect Whiteacre or cause it to be inspected by another. A does not know or have reason to know of the infestation. Therefore, knowledge of the

infestation is not imputed to P. However, as a result of A's failure, P has not complied with P's statutory duty to T. P is subject to liability to T. A may be subject to liability to P, see § 8.08, and to T, see § 7.01.

As discussed more fully in Comment *e*, regardless of the circumstances under which an agent acquires knowledge of a fact or reason to know it, notice of the fact is imputed to the principal if material to the agent's duties, unless the agent owes a duty to another not to disclose the fact to the principal. In many instances, a principal benefits when an agent brings to bear all material facts then known to the agent, as indeed an agent has a duty to do. See §§ 8.08 and 8.11. Imputation charges a principal with the legal burdens of taking action through another person with the benefit of what each then knows or has reason to know. The scope of an agent's duties delimits the content of knowledge that is imputed to the principal. When an agent's obligations to others prevent disclosure to the principal of material facts known to the agent that are material to the agent's duties to the principal, the agent may be obliged to terminate the agency relationship.

Illustrations:

Illustrations:

5. P Corporation manufactures construction supplies, using numerous chemicals in its manufacturing processes. Governmental regulations applicable to P Corporation require that it dispose of chemicals used in manufacturing in a manner that does not degrade the natural environment and that it promptly investigate and rectify environmentally damaging spills of chemicals. P Corporation employs A, an environmental engineer, whose duties include monitoring P Corporation's facilities for compliance with applicable environmental regulations and reporting the results of A's findings to S, a superior agent within P Corporation. While touring the exterior of P Corporation's plant, A inspects a pipe that drains used chemicals into storage vats. A observes that a chemical is leaking from a pipe into the ground in close proximity to a stream. A does not tell S or any other agent of P Corporation about the leaky pipe. Notice of the fact that the pipe leaks, known to A, is imputed to P Corporation.
6. Same facts as Illustration 5, except that P Corporation permits its employees to use certain of its grounds for leisure-time activities, such as hiking. A observes the leaky pipe while hiking P Corporation's grounds during a vacation from work. Notice of the fact that the pipe leaks, known to A, is imputed to P Corporation because it is material to A's duties to P Corporation, regardless of the circumstances under which A gained the knowledge.
7. Same facts as Illustration 6, except that the leaky pipe is observed by B, a clerk in P Corporation's accounts-payable department. B's duties do not include monitoring P Corporation's compliance with environmental regulations. Notice of the fact that the pipe leaks, known to B, is not imputed to P Corporation.

Not all that an agent knows constitutes a "fact" for purposes of this doctrine. An agent's knowledge that the agent has acted or intends to act in a manner unauthorized by the principal is not imputed to the principal. However, notice of an agent's knowledge of the agent's own intention may be imputed to the principal as, for example, when an agent makes a promise to a third party on behalf of the principal that the agent does not intend to fulfill. If an agent deals with a principal as an adverse party on the agent's own account, the principal is not charged with notice of facts known to the agent because the agent is not acting as the principal's agent in the transaction.

Agents who are individuals may forget what they once knew or learned under circumstances in which an agent's memory does not retain the information for long. If an agent learns a material fact when a relationship of agency exists with a particular principal, the principal is charged with notice of the fact although the agent forgets the fact or claims to have forgotten it at a later time when knowledge of the fact is material to the principal's legal relations. For example, in Illustration 6, notice of the fact of the leaky pipe is imputed to P Corporation even if A claimed to have forgotten about it. Moreover, an agent may continue to have reason to know a fact although the agent may no longer remember it. If the agent relays the fact to the principal, who forgets it, the principal is charged with knowledge of the fact.

In contrast, if an agent learns a material fact prior to the existence of a relationship of agency with a particular principal, the agent may not be subject to a duty to remember the fact. It is a question of fact whether an agent knows or has reason to know a fact at a subsequent time when the agent takes action and when the fact, if known at that time, would be material to legal consequences for the principal. The nature of the fact and the circumstances under which an agent learned it are relevant to whether the agent may plausibly claim to have forgotten the fact.

Just as it may be difficult for a third party to show that an agent duly transmitted information to a principal, it may be difficult for a third party to show that an agent remembered information when the agent claims to have forgotten it. Some cases address this problem through a presumption that an agent continues to know recently acquired information when the agent acts on behalf of the principal. Others allocate to the third party the burden of showing that the agent remembered the information at the time of taking action. It is preferable to allocate the burden to the principal to show that knowledge, once acquired by an agent, had been forgotten by the time of taking action. The third party should not bear the burden of establishing the agent's knowledge because principal and agent are more likely to know facts relevant to proving that the agent has forgotten what the agent once knew.

Illustration:

Illustration:

8. P retains A to act as closing agent on P's behalf in P's purchase of Blackacre from T. A also acts in like capacity for many others. Some years before, A acted as closing agent on behalf of S in S's sale of Blackacre to T. In reviewing the closing documents at that time, A learned that Blackacre was subject to an unrecorded equitable lien in favor of L. By the time A conducts P's closing, A has forgotten about the unrecorded lien. L seeks to enforce the lien. Notice of L's interest is imputed to P unless P carries the burden of proving that A had forgotten about the lien.

Earlier academic accounts of agency and cases justified imputation as a consequence of deeming an agent and a principal to share the same legal identity. This approach does not adequately reflect the fact that principal and agent retain separate legal personalities. See § 1.01, Comment *c*. It also fails to explain why notice of less than all of an agent's knowledge is imputed to a principal; why notice of facts may be imputed to a principal when an agent learned them prior to the relationship of agency or in extramural circumstances, see Comment *e*; and why notice of facts known to a principal is not imputed downward to an agent, see Comment *g*.

Most contemporary cases tie imputation doctrine to an agent's duties, often stressing that an agent has a duty to transmit material facts to the principal. An agent's duties to a principal may limit the scope of what is imputed but do not constitute a comprehensive reason for imputation itself. As noted above, a principal may not defeat the imputation of notice of a material fact known to an agent on the basis that the agent breached the agent's duty to communicate the fact to the principal. Moreover, notice of material facts that an agent knows or has reason to know is imputed to the principal although the agent has reason to believe that the principal would prefer not to know such facts. For example, in Illustration 8, P may not defeat imputation of notice of L's unrecorded lien on Blackacre on the basis that P instructed A to close the transaction and purchase Blackacre from S without telling P about any such circumstances.

A more comprehensive justification for imputation focuses on its impact on behavior. Imputation creates strong incentives for principals to design and implement effective systems through which agents handle and report information. By charging a principal with notice of material facts that an agent knows or has reason to know, imputation reduces incentives to deal through agents as a way to avoid the legal consequences of facts that a principal might prefer not to know.

c. Imputation within organizational principals. Imputation doctrines, like common-law agency in general, treat a juridical person that is an organization as one legal person. Organizations generally function by subdividing work or activities into specific functions that are assigned to different people. See § 1.03, Comment *c*. Within an organization, the work done by some agents consists of obtaining information on the basis of which coagents take action. Imputation recognizes that an organization constitutes one legal person and that its link to the external world is through its agents, including those whose assigned function is to receive, collect, report, or record information for organizational purposes. For example, in Illustrations 5 and 6, A's assigned function is to monitor circumstances relevant to P Corporation's compliance with environmental regulations and report A's findings to S. P Corporation may assign responsibility to others to ensure that apparent violations are investigated and that required reports are made to governmental officials.

The nature and scope of the duties assigned to an agent are key to imputation within an organization. In Illustration 7, in contrast to Illustrations 5 and 6, the duties assigned to B do not encompass acquiring or reporting information relevant to P Corporation's compliance with environmental regulations. Thus, P Corporation is not charged with the legal consequences of

B's knowledge of a fact that lies outside the scope of B's duties to P Corporation.

An organization's large size does not in itself defeat imputation, nor does the fact that an organization has structured itself internally into separate departments or divisions. Organizations are treated as possessing the collective knowledge of their employees and other agents, when that knowledge is material to the agents' duties, however the organization may have configured itself or its internal practices for transmission of information.

Illustration:
Illustration:

9. T Corporation issues debentures containing a covenant that restricts T Corporation's right to borrow additional funds. A, who is employed by the credit department of P Bank to monitor the financial reports of issuers of securities, learns of the restrictive covenant in the debentures issued by T Corporation. A does not communicate this fact to the loan department of P Bank, which lends additional money to T Corporation on terms that violate the restrictive covenant in the debentures. A's knowledge will be imputed to P Bank.

If an agent has learned a fact under circumstances that impose a duty on the agent not to reveal it to a principal, notice of that fact is not imputed to that principal. Thus, notice of a fact that an agent learns in confidence from one principal is not imputed to another principal. For further discussion, see Comment *e*.

An organization may put in place internal restrictions on how information is handled and transmitted to assist in fulfilling duties of confidentiality owed to its clients. Such restrictions are common in multifunction financial-services firms.

Illustration:
Illustration:

10. P Corporation is a multifunction financial-services firm. Its commercial-lending department enters into a loan agreement with T, which provides that T will supply nonpublic financial information about itself, that the information will be used within the loan department to form credit judgments about T, and that P Corporation will not otherwise use or reveal the information. P Corporation's trust department gives investment advice to customers, including whether to buy or sell securities. P Corporation restricts access to nonpublic information provided by T and other loan customers like T to personnel in its commercial-lending department who need to know it to service a customer's account and to supervisory personnel who monitor compliance with the prohibition. P Corporation also has a policy that otherwise prohibits communication of such information, including communication to personnel in other departments. Personnel in P Corporation's commercial-lending department comply with these restrictions and prohibitions in handling the information supplied by T. Information about T learned by personnel in P Corporation's commercial-lending department is not imputed to P Corporation in connection with the activities of its trust department.

If information is communicated within an organization contrary to a prohibition imposed by an internal barrier on communication, the firm is charged with notice of the information. Thus, in Illustration 10, if personnel in P Corporation's commercial-lending department transmit to personnel in the trust department the information that T supplied to the commercial-lending department, notice of the information is imputed to P Corporation, affecting its legal relations with customers of its trust department. Whether such communication has occurred is a question of fact. Prior communications that contravene an organization's internal barrier call the barrier's general effectiveness into question. A barrier is not likely to be effective or to appear credible when personnel who possess nonpublic information work on shared projects with personnel whose job functions involve trading or other activity that would be aided by access to nonpublic information. Indicia of commitment to the barrier at an organization's highest levels enhance its credibility, as does consistent imposition of sanctions when violations are known to have occurred. A barrier's credibility will also be enhanced by regular review of its efficacy by a suitable organ of internal governance, such as an internal audit or regulatory department or an independent audit or other committee of a board of directors.

Barriers on intra-organization transmission of nonpublic information may also be strongly encouraged or required by law or regulation, which evolves as circumstances require. For example, the SEC's Rule 14e-3(b), promulgated under § 14(e) of the

Securities Exchange Act, provides that a person (other than a natural person) will not be subject to liability for trading on the basis of nonpublic information about an impending tender offer if the person has established reasonable policies to ensure that individuals who make decisions to trade in securities of the target corporation do not receive information about the bid possessed by other individuals within the same firm. Such barriers may also be required by law. For example, the Insider Trading and Securities Fraud Enforcement Act of 1988 requires broker-dealers and investment advisers to establish and maintain written procedures to prevent misuse of inside information. See 15 U.S.C. § 78*o*(f). National banks are required by the Office of the Comptroller of the Currency to use internal barriers to prevent bank trust departments from unlawfully obtaining nonpublic information from other bank departments. See 12 C.F.R. § 9.5.

An internal barrier on communication of nonpublic information does not provide a defense to the legal consequences of a failure to take action in light of information that is otherwise freely available. Thus, in Illustration 10, the fact that P Corporation prohibits the transmission of nonpublic information provided by T from the commercial-lending department does not relieve its trust department of duties to take action on the basis of information about T that is otherwise freely available.

d. Significance to principal's legal relations of imputing notice of facts. Although imputation is often characterized as a doctrine relevant to a principal's liability, it operates more generally. Imputation may affect a principal's legal relations in diverse contexts.

(1). Legal consequences—contracts and other transactions. A party's rights and duties created by a contract may be affected by the party's knowledge of facts. For example, facts known to a contracting party may be relevant to interpreting terms in the contract, may establish defenses to duties of performance, and may provide grounds on which the contract may be rescinded. If an agent enters into a contract on behalf of a principal, notice is imputed to the principal of material facts that the agent knows or has reason to know.

Illustrations:

Illustrations:

11. As agent for P, A enters into a written contract with T knowing that T does not understand the writing and also knowing that the writing does not correspond in a material respect to the agreement to which T believes T has consented. Notice of the facts about T's understanding and the writing known to A is imputed to P. P may not enforce the contract against T. A's knowledge of T's mistake is imputed to P. See Restatement Second, Contracts § 153(b).
12. A, the Executive Vice President of P Corporation, purchases a liability-insurance policy on P Corporation's behalf issued by T Corporation. The policy application completed by A states that the applicant, P Corporation, knows of no present condition that would give rise to a claim under the policy. A knows of such a condition. Notice of the condition known by A is imputed to P Corporation. Under the substantive law of insurance, T Corporation may avoid the policy.
13. Same facts as Illustration 12, except that A does not know of a present condition that would give rise to a claim under the policy. B, an upper-level employee of P Corporation, knows of such a condition but, contrary to B's duty to P Corporation, tells no one. Notice of the condition known by B is imputed to P Corporation. Although B did not complete the policy application, B's knowledge is material to B's duties to P Corporation and material to the accuracy of representations made by P Corporation in its application for insurance. T Corporation may avoid the policy.
14. P Corporation, which operates a chain of fast-food restaurants, employs A, a food broker, to purchase supplies on its behalf. On behalf of P Corporation, A enters into negotiations with S, the Vice-President of T Corporation, a poultry producer. T Corporation's sales manager drafts a contract calling for T Corporation to sell a large quantity of "chicken" to P Corporation at prices and on terms stated in the contract. Prior to executing the contract, A asks S what T Corporation intends the term "chicken" to mean. S replies that by "chicken," T Corporation means "broilers or fryers." A executes the contract on P Corporation's behalf. T Corporation tenders delivery of a quantity of stewing chicken to P Corporation. The contract does not contain an integration clause and the parol-evidence rule does not exclude proof of the interchange between A and S about the meaning of "chicken." P Corporation may reject the shipment as nonconforming under its contract with T Corporation. Notice of the fact of T Corporation's

interpretation of "chicken," known to A, is imputed to P Corporation. Notice is imputed to T Corporation of the fact, known to S, that A and, through A, P Corporation, believe that T Corporation understands "chicken" to mean "broilers or fryers."

(2). Legal consequences—tort liability. If an agent's action interferes with the legally protected interests of other persons, the action may constitute a tort. An actor's knowledge and intention often determine whether an act is tortious. In this context, imputing notice to the principal of facts that an agent knows or has reason to know underlies the principal's vicarious liability for action by the agent that constitutes a tort.

Illustration:
Illustration:

15. A is retained by P, a dealer in industrial equipment, as a sales representative. On behalf of P, A sells a machine owned by P to T, representing that the machine has been used only for demonstration purposes by its manufacturer. This statement is false, as A knows. Notice is imputed to P of the fact, known to A, that the equipment has been used other than for demonstration purposes.

Particular legal consequences may depend on a combination of knowledge or reason to know a fact, plus a specific intention. For example, a claim of fraud may require that a person who misstated a material fact have made the misstatement intending to defraud the person to whom the statement was made. If so, a principal may not be subject to liability for fraud if one agent makes a statement, believing it to be true, while another agent knows facts that falsify the other agent's statement. Although notice is imputed to the principal of the facts known by the knowledgeable agent, the agent who made the false statement did not do so intending to defraud the person to whom the statement was made. The person to whom the statement was made may nonetheless have remedies available against the principal, such as rescission of any transaction induced by the false statement. If the agent who made the false statement did so negligently, the principal may be subject to liability for negligent misrepresentation. See Restatement Second, Torts § 552.

In contrast, in Illustration 15, A knowingly makes a false representation to T. A's knowledge of the falsity is imputed to P. P is subject to liability to T for the loss caused to T. See Restatement Second, Torts § 525. Rescission is available to T as a remedy alternative to recovery of damages. See id. § 549, Comment *e*.

Particular legal consequences may also depend on whether action was taken reasonably. Material facts known to an agent may establish that action was taken reasonably when the law requires reasonable action, if notice of those facts is imputed to the principal.

Illustrations:
Illustrations:

16. A, a security guard employed by P Bank, overhears two patrons waiting in line at a teller window discuss plans to rob the bank. A thereupon detains them. Notice of the fact of the conversation, known to A, is imputed to P Bank and is a defense to a claim for false imprisonment asserted by the detained patrons.
17. P Corporation retains A, a loan broker, to obtain a loan on its behalf and to handle the requisite paperwork. Applicable law requires a lender to make itemized disclosure of all fees it charges for a loan and provides remedies to the borrower against the lender if such disclosure is not made. A arranges a loan to P Corporation to be made by T Corporation. T Corporation provides A with a written and itemized disclosure of fees it will charge in connection with the loan to P Corporation that complies with applicable law. The loan agreement given to P Corporation does not itemize the fees that T Corporation is charging. A does not give T Corporation's written fee disclosure to any officer or employee of P Corporation. Notice is imputed to P Corporation of the fees charged by T Corporation.

(3). Legal consequences—acquisition of property. An agent who acquires property for a principal may know or have reason to know material facts about the property, including facts relevant to other persons' interests and claims. Notice of such facts is generally imputed to the principal.

Illustrations:

Illustrations:

18. P retains A to purchase Blackacre for P from S. A knows that T has an unrecorded equitable interest in Blackacre. A does not tell P and purchases Blackacre for P. P takes Blackacre subject to T's interest but may have an action against A. See § 8.11, which states an agent's duty to furnish material information to the principal.
19. P retains A to purchase Blackacre for P from S. A learns that neighboring structures obstruct the scenic view from portions of Blackacre. Based on statements previously made to P by S, P believes that Blackacre enjoys unobstructed scenic views. A does not tell P what A has learned and purchases Blackacre for P. P seeks to rescind the purchase on the basis that P believed Blackacre's scenic view to be unobstructed. Notice of the fact of the obstruction, known to A, is imputed to P. P may have a claim against A. See § 8.11.

(4). Legal consequences—acquisition of information. An agent who does not represent a principal in transactions may be authorized to acquire information on the principal's behalf, as in Illustrations 5 and 6. As discussed in Comment *b*, it is not unusual for organizations to assign duties to gather information to agents who do not otherwise interact with third parties on the principal's behalf. If an agent fails to discover a fact that the agent should know in light of the agent's duties and prior knowledge, notice of the fact is not imputed to the principal. However, as in Illustration 4, a principal may be subject to liability to a third party when, as a result of an agent's failure to discover a fact, the principal breaches a duty owed by the principal to the third party. The principal's liability is not a consequence of imputing notice to the principal of facts not known by the agent but a consequence of the principal's breach of a duty, itself the consequence of a breach of duty by the agent.

(5). Legal consequences—timeliness of action. Knowledge of a fact or reason to know it may determine whether a person has asserted a claim in timely fashion by bringing suit because knowing the fact or having reason to know it determines when the applicable statute of limitations begins to run. Likewise, knowledge of a fact or reason to know it may determine whether a claim has been made or notice has been given in a timely fashion under an insurance policy or other contract stating how one party may assert a claim against another. Facts that an agent knows or has reason to know may thus determine whether the principal has acted in timely fashion.

Illustrations:

Illustrations:

20. P Corporation carries a policy of liability insurance, written by T Corporation, that requires P Corporation to give prompt notice to T Corporation of the occurrence of events that may give rise to claims under the policy. A, the manager of P Corporation's Risk Management department, learns that such an event has occurred. Notice is imputed to P Corporation of the fact, known to A, that an event has occurred that may give rise to claims under the policy.
21. Same facts as Illustration 20, except that A learns of the event 10 days after it happens. P Corporation gives notice to T Corporation the next day after A learns of the event. P Corporation's notice is timely because P Corporation is not charged with notice of the fact known to A until A has the knowledge.

(6). Legal consequences—ratification. If notice is imputed to a principal of a fact that an agent knows or has reason to know, the principal may be held to have ratified an act for which an agent lacked actual or apparent authority if the principal manifests assent to the act or otherwise consents to it. See § 4.01(2). On the knowledge requisite for ratification, see § 4.06.

Illustration:

Illustration:

22. A, the sales manager for P Corporation, enters into a contract to sell a large quantity of poultry to T Corporation. A does not have actual or apparent authority to enter into the contract. B, the President of P Corporation, learns of the terms of the contract and tells A that P Corporation will perform the contract. Notice is imputed to P Corporation of the facts about the contract known to B. B has also manifested assent on behalf of P Corporation. P Corporation has ratified A's act in entering into the contract with T Corporation.

(7). Legal consequences—requirement of personal knowledge. In some circumstances, the law may condition a particular result on whether an individual person had personal knowledge of a fact. For example, personal knowledge may be required

for some forms of criminal liability or other penal consequences, for the imposition of penalties within certain licensing regimes, and when a statute requires personal knowledge for a particular legal consequence. In a corporate context, as when a statute imposes criminal liability on a corporation itself, the relevant personal knowledge is that of the individual who took the action that the statute criminalizes, or, in appropriate circumstances, the personal knowledge of the individual who directed or ratified the action taken. See also Comment *d(2)* for discussion of tort liability.

e. Circumstances under which agent acquires knowledge of or reason to know facts. If an agent knows a fact or has reason to know it, notice of the fact is imputed to the principal if the fact is material to the agent's duties unless the agent is subject to a duty not to disclose the fact to the principal or unless the agent acts with an adverse interest as stated in § 5.04. This is so regardless of how the agent came to know the fact or to have reason to know it. When an agent is aware of a fact at the time of taking authorized action on behalf of a principal and the fact is material to the agent's duties to the principal, notice of the fact is imputed to the principal although the agent learned the fact prior to the agent's relationship with the principal, whether through formal education, prior work, or otherwise. Likewise, notice is imputed to the principal of material facts that an agent learns casually or through experiences in the agent's life separate from work.

However, as stated in subsection (b), when an agent is subject to a duty to another not to disclose a fact to the principal, the agent's knowledge is not imputed to the principal. Information that an agent learns in confidence from one principal is not imputed to another principal. See, e.g., Restatement Third, The Law Governing Lawyers § 28(1). An agent who owes a duty of confidentiality to one principal may not be able to fulfill duties that the agent will owe to another principal who also retains the agent. See §§ 8.01, 8.03, and 8.11.

The breadth of notice imputed to a principal of facts that an agent knows or has reason to know mirrors the agent's duty to the principal, as discussed in Comment *b*. When an agent is an individual, the breadth of imputation also reflects the fact that an individual agent's mind "cannot be divided into compartments...." Restatement Second, Agency § 276, Comment *a*. An agent brings the totality of relevant information that the agent then knows to the relationship with a particular principal. This often works to the benefit of a principal who retains an agent. Most cases that consider the question adopt the rule as stated. Many cases state in passing that an agent's knowledge is imputed to the principal if the agent acquired it "within the course" of the agency relationship but do not consider whether the circumstances under which the agent acquires knowledge of a fact should matter. The better rule is the broader rule that charges a principal with the totality of an agent's knowledge of material facts and disregards the provenance of how the agent learned them.

f. Time when notice is imputed to principal. Notice of a fact that an agent knows or has reason to know is not imputed to a principal unless it is material to legal consequences for the principal as a consequence of action taken, or a failure to act, on the part of the knowledgeable agent, another agent, or the principal. For example, in Illustration 2, A's reason to know the wind conditions that afflict Blackacre is not material to P's legal relations until some action is taken, such as entering into a contract to sell Blackacre to T when applicable law requires disclosure of such conditions to a purchaser.

Notice of a fact that an agent learns following the termination of the agent's actual authority is not imputed to the principal. See § 8.05 on post-termination duties owed by agents concerning property and confidential information of the principal. However, if an agent acts with apparent authority in dealing with a third party, notice is imputed to the principal of material facts that the agent knows or has reason to know when knowledge of those facts is material to the principal's legal relations with the third party.

g. Downward imputation. Notice of facts that a principal knows or has reason to know is not imputed downward to an agent. A principal does not owe a duty of disclosure to an agent that is a full counterpart of the duty owed by an agent to relay material facts, as discussed in Comment *b*. For the principal's duties of disclosure, see § 8.15.

As a consequence, an agent who deals with third parties on the principal's behalf is not treated as knowing facts known by the principal that the agent does not know or have reason to know. This protects the agent from the legal consequences of facts that only the principal knows or has reason to know. A principal may be subject to liability to a third party if the principal withholds relevant information from an agent, knowing that the agent will materially misstate facts to a third party as a result.

Illustration:

Illustration:

23. A represents P, a prospective purchaser of businesses. A negotiates the terms of a contract under which P will buy a business from T, its owner, with T to provide financing. A does not know and has no reason to know the relevant facts concerning P's finances, which make it likely that P will default on the debt owed to T. After P defaults on the debt P owes T, T sues A, alleging that A fraudulently failed to disclose the true facts of P's finances. Notice of the facts about P's finances is not imputed to A. P may be subject to liability to T if P had a duty to disclose these facts to T. On A's rights to be indemnified by P for the costs of A's defense, see § 8.14.

In contrast with the rule stated in this section, most codifications of agency law state that principal and agent are each deemed to have notice of all of which the other has notice. However, these provisions also state that such deeming shall be operative only "as against the principal."

In contexts defined by a regulatory statute, some courts have imputed notice of facts known by a principal downward from principal to agent when the principal has a duty to transmit all material facts to the agent and the statute's regulatory objectives would be undermined were principals to limit disclosure of material facts to their agents.

Reporter's Notes

*a. Comparison with Restatement Second, Agency.*This section consolidates treatment of topics covered by Restatement Second, Agency §§ 272 to 281. Substantive changes are noted below.

*b. Justifications for imputation; limitations on relevance of imputation.*On an agent's duty as the basis for the doctrine, see Apollo Fuel Oil v. United States, 195 F.3d 74, 76 (2d Cir.1999) ("[i]n general, when an agent is employed to perform certain duties for his principal and acquires knowledge material to those duties, the agent's knowledge is imputed to the principal"); Cromer Fin. Ltd. v. Berger, 245 F.Supp.2d 552, 560 (S.D.N.Y.2003) ("[t]he law presumes that it is fair to find that that which the agent knows, the principal knows as well, because it is also presumed that in the normal course of their relationship, the agent will have a duty to disclose information acquired in the course of the agency"); Triple A Mgmt. Co. v. Frisone, 81 Cal.Rptr.2d 669, 678-679 (Cal.App.1999) (basis for imputing agent's knowledge to principal "is that the agent has a legal duty to disclose information obtained in the course of the agency and material to the subject matter of the agency, and the agent will be presumed to have fulfilled this duty"; escrow agent's knowledge of collateral nature of assignment is imputed to lender who retained agent; knowledge obtained by agent in separate but simultaneous transaction is not imputed because scope of escrow agent's duty to disclose is narrow and limited to specific transaction and instructions given to agent); Southport Little League v. Vaughan, 734 N.E.2d 261, 275 (Ind.App.2000) (imputation rests on "the legal principle that it is the duty of the agent to disclose to his principal all material facts coming to his knowledge, and upon the presumption that he has discharged that duty.").

On identification between agent and principal as the basis for imputation, see Stump v. Indiana Equip. Co., 601 N.E.2d 398, 403 (Ind.App.1992) ("[i]mputed knowledge is a tenet of agency law, and is based on an underlying legal fiction of agency—the identity of agent and principal when the agent is engaged in the principal's business.").

The best-known assertion that identification between agent and principal underlies agency doctrine is Oliver Wendell Holmes, Agency, I, 4 Harv. L. Rev. 345, 350 (1891). The rationale of fictitious identification may have declined in appeal because it is no longer necessary. If it is understood that imputation charges the principal with notice of what is known by the agent on the basis of the duties the agent owes the principal, interjecting a claim of fictitious identification becomes superfluous. On why fictions die in explanatory force, see Lon L. Fuller, Legal Fictions 19 (1967) ("[t]he death of a fiction

Appendix 5

Restatement (Second) of Agency § 272 (1958)

Restatement of the Law - Agency

Database updated June 2014
Restatement (Second) of Agency

Chapter 8. Liability of Principal to Third Persons; Notice Through Agent

Topic 2. Knowledge of Agents

§ 272 General Rule

Comment:

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Case Citations - by Jurisdiction

In accordance with and subject to the rules stated in this Topic, the liability of a principal is affected by the knowledge of an agent concerning a matter as to which he acts within his power to bind the principal or upon which it is his duty to give the principal information.

See Reporter's Notes.

Comment:

a. The liability of a principal because of the knowledge of the agent is based upon the existence of a duty on the part of the agent to act in light of the knowledge which he has. The principal is affected by the agent's knowledge whenever the knowledge is of importance in the act which the agent is authorized to perform. The knowledge may be of importance where:an agent makes a contract for the principal or acts in the execution of a contract;

the conduct of an agent or principal interferes with the protected interests of another and thereby may constitute a tort against such other;

an agent acquires property for the principal; or

an agent is employed by the principal to act in relation to a matter and to make reports concerning it to the principal or to other agents of the principal.

b. Where agent has reason to know or should know. In situations in which knowledge of a particular fact is relevant to the legal liability of participants in an event, their liability is often affected by their having knowledge of other facts from which persons of ordinary intelligence and prudence would infer the existence of the fact in question or would be led to make such inquiries as would give them knowledge of it. In such cases they have reason to know the fact in question or they should know of it. The Comment on Section 9 indicates the meaning of these phrases and gives illustrations of situations in which

knowledge is important in a variety of situations. If an agent has reason to know or should know a particular fact, the principal is affected as if the circumstances were such that the principal would have reason to know or should know the fact, subject to the rules stated in Sections 274- 282.

c. Situations in which knowledge is important. In contracts, knowledge of a contracting party is relevant in determining the interpretation of the contract, in the determination of grounds for reformation or rescission, and in determining the questions relating to performance and breach. Thus, if one party knows that the other party is giving a particular interpretation to the words of an offer, this interpretation, unless prevented by the parol evidence rule, prevails. Likewise, the knowledge of a person dealing with an agent as to the limitations of the agent's authority or the motive with which the agent acts is often of great importance, since an agent acting in violation of a limitation upon his authority or with a motive adverse to his principal does not bind his principal to a person knowing such limitation or purpose. In the performance of a contract the knowledge of a party that the other has not performed or will not perform is of importance in determining the matter of damages and may be of importance in determining the time when the cause of action arises. In all such cases a principal is affected by the knowledge of the agent acting for him as he would be by his own knowledge, within the limitations stated in the following Sections.

In determining tort liability, the knowledge which the actor has or should have is usually of great importance. This is particularly true in cases of negligence and in torts which, like deceit or malicious prosecution, are based upon the fact that the defendant has acted improperly in view of the knowledge which he has.

In the acquisition of property, the knowledge which a person has of the interests of third persons may prevent his acquiring an interest in the subject matter of the property free from the interests of others.

Illustrations:

Illustrations:

1. A, as agent for P, enters into a written contract with T, knowing that T does not understand the instrument and that it does not correspond to the agreement to which T consents. P is bound by A's knowledge and cannot enforce the contract against T.
2. In selling a horse to T, A makes a representation that it is sound. A's principal, P, is affected by A's knowledge that the horse is unsound.
3. A purchases Blackacre from B for P, knowing that T has an equity therein not of record. P is affected by A's knowledge, subject to the limitations stated in Sections 281- 282.
4. A is employed by P to report upon the title to Blackacre and to tell him of any secret equities which he may discover. A discovers that T has an equity in Blackacre, but negligently fails to report this to P, who accordingly buys Blackacre from B. P is affected by A's knowledge.
5. A, general manager for P, learns that a ship owned by P has sunk. Although he knows that P's insurance broker has been instructed to take out insurance upon the ship, "lost or not lost," but has not yet done so, he negligently fails to communicate with the broker and the insurance is effected. The insurance is invalidated by A's knowledge.
6. P employs A to manage rental property. A learns that a stairway used in common by a number of tenants is dangerously weak. P's liability for harm to a tenant, hurt by the fall of the stairway, results from A's knowledge.

Comment:

d. Knowledge of agent beneficial to principal. Just as the principal may be adversely affected because the agent has knowledge of facts, so he may be relieved from a liability which otherwise would exist by the fact that an agent or servant has knowledge. The performance of many acts is privileged only because done for a particular purpose and upon reasonable grounds. As evidence of such purpose or grounds, the knowledge of the agent who acts may be shown. Likewise, a

contracting party may be excused from performance if he has reason to believe from the conduct of the other party that the other does not intend to perform. The reasonable belief of an agent in charge of performance of the contract that the other party does not intend to perform may be shown to relieve the principal from liability for failure to perform.

Illustrations:

Illustrations:

7. A, a railway conductor, overhears two passengers apparently making plans to rob the mail car. He thereupon imprisons them. His knowledge is a defense to the railroad in an action by the passengers against it for false imprisonment.
8. A overhears T, to whom he is about to deliver goods for P, state that after receiving them he does not intend to pay. A thereupon refuses to make the delivery. Irrespective of T's intent to pay for the goods, P is relieved from liability for failure to deliver them if it is found that A reasonably believed from what T said that T would not pay for them.

Comment:

e. Duration of knowledge. Matters once known may be forgotten when the event occurs to which notice or the lack of it is legally material. In some of such cases, as, for instance when the legal standard is "good faith" in the subjective sense, the forgetting is material; the law does not charge the party with the knowledge that he no longer has. In other situations, forgetting does not help him; the law holds him bound by the notice or knowledge he once had, whether or not he has it now. In neither case is it material whether he originally got the knowledge or notice himself or was charged with it because his agent had it.

f. Knowledge by agent of his breaches of duty. The principal is not affected by the knowledge of the agent that he is or has been violating instructions, although acting for the general purposes of his employer. See § 280.

g. Where agent is unauthorized. A principal may be affected by the knowledge of an agent not authorized to do the act or conduct the transaction in which knowledge is important if the act or transaction is one in which the principal is responsible for his agent's conduct. Thus, a principal, disclosed or undisclosed, is affected by the knowledge of a general agent as to relevant facts in connection with the contract which the agent has power to make. Likewise, a principal may be subject to liability in an action of tort because of the knowledge of an agent in doing an act in which liability depends on the agent's knowledge or lack of knowledge, as where a selling agent knowingly makes a misrepresentation. The principal is not, however, affected by the knowledge of an agent acting only within his apparent authority, except as stated in Section 273.

h. Effect of ratification. If a person does an act capable of ratification and this is ratified by the purported principal, the latter is affected by the knowledge of the purported agent to the same extent as if the act had been originally authorized. See Section 91 as to the knowledge of the principal required for ratification.

REPORTER'S NOTES

The following cases are illustrative of situations in which the master or other principal was held liable or was prevented from maintaining an action because of the knowledge of an agent as to the physical condition of land or other property which caused harm: Linker v. Container Corp. of America, 96 F.Supp. 911 (E.D.Pa.1951), knowledge of foreman of defective

Appendix 6

Restatement (Second) of Agency § 214 (1958)

Restatement of the Law - Agency

Database updated October 2014

Restatement (Second) of Agency

Chapter 7. Liability of Principal to Third Person; Torts

Topic 1. Liability for Personal Violation of Duty

§ 214 Failure of Principal to Perform Non-delegable Duty

Comment:

Case Citations - by Jurisdiction

A master or other principal who is under a duty to provide protection for or to have care used to protect others or their property and who confides the performance of such duty to a servant or other person is subject to liability to such others for harm caused to them by the failure of such agent to perform the duty.

Comment:

a. Unless one has directed a specific tortious act or result, or has been negligent, he is normally not responsible for the conduct of others, except that of his agents or servants acting within the scope of their employment. By contract, however, or by entering into certain relations with others, a person may become responsible for harm caused to them by conduct of his agents or servants not within the scope of employment; the extent of this liability depends upon the duty assumed. Also, if one contracts for a result to be achieved, in accomplishing which there is a peculiar likelihood of harm to others, he may become liable for the conduct of those not his agents or servants. There are three forms of the duty of protection. First, a person may have a duty to protect another which can be performed either by exercising care personally in protecting the other or by exercising care in the employment of an independent contractor to protect the other. Secondly, there may be a duty to protect another at all hazards, a duty which is not fulfilled unless the other is protected and which is not satisfied by the use of care. This duty normally exists only when undertaken by contract. Thirdly, one may have a duty to see that due care is used in the protection of another, a duty which is not satisfied by using care to delegate its performance to another but is satisfied if, and only if, the person to whom the work of protection is delegated is careful in giving the protection. In this third class, the duty of care is non-delegable. It is beyond the scope of the Restatement of this Subject to do more than state the general rule and indicate the most frequently arising situations in which a master or other principal may be liable, although without personal fault, for conduct of his agents or servants, whether or not they are acting in scope of employment. In fact, a person who has undertaken a specific piece of work is also liable for the failure of those not his servants or agents to carry out the terms of the undertaking.

b. Action illegal unless licensed. When a license is required for the performance of acts, one having a license who delegates performance of the acts to another is subject to liability for the negligence of the other. Thus, a trucking company doing an interstate business requiring a license is liable for the negligence of an independent contractor whom it employs to do some of the work.

c. Highly dangerous activities. A person who directs another to enter upon an undertaking in which the risk of harm to third persons is great unless certain precautions are taken is sometimes liable to persons injured by the work through the failure of those engaging in it to take such precautions. The rule and its applications are stated more fully in the Restatement of Torts, Sections 416-429. It is not within the scope of the Restatement of this Subject to state what undertakings are so intrinsically dangerous that, although it is not negligent to engage in them, one employing another to engage in them is responsible for the incidental negligent conduct of such other in performing the work. Under the rule stated in this Section, liability exists only if some one connected with the undertaking performs it negligently and then only if the negligence is with respect to the element in the undertaking which causes it to be classed as inherently dangerous.

Illustrations:

Illustrations:

1. P employs A, a careful and competent person, to dig a hole in the street, instructing him to protect travelers therefrom, a permit therefor having been obtained from the city authorities. A digs the hole but negligently fails to illuminate it. P is subject to liability to T, a traveler hurt by falling into the hole owing to the absence of a lantern.

2. Same facts as in Illustration 1, except that A places an adequately protected light near the hole, this being due care on his part. The light is stolen by a third person. P is not liable to T.

Comment:

d. Occupiers of land. The possessor of premises is under a duty to have due care used to prevent the premises from harming persons in the vicinity and business visitors upon them. In some instances he can satisfy this duty by being personally careful. In other situations he is subject to liability for the conduct of an independent contractor whom he employs to make repairs. Thus, the landlord, under a duty to a tenant to keep a common stairway in repair, is subject to liability for harm caused the tenant by the negligent repair or failure to repair by one whom he employs either as an independent contractor or as a servant. If the duty is only to be personally careful, as is the duty to a seen trespasser, he is subject to liability only for conduct of a servant or other agent which is within the scope of employment. See §§ 228- 267. The rules and their applications are stated in the Restatement of Torts, Sections 410-425. The duty of an employer to employees with respect to the condition of the business premises is stated in Sections 501- 503.

e. Voluntary relations. A master or other principal may be in such relation to another that he has a duty to protect, or to see that due care is used to protect, such other from harm although not caused by an enterprise which has been initiated by the master or by things owned or possessed by him. This duty may be created by contract, as where one agrees to protect another,

or may be imposed by law as incident to a relation voluntarily entered into, as the relation of carrier and passenger, or by statute. A statement of the situations in which a duty of this sort exists and of the limits of such duty is beyond the scope of the Restatement of this Subject. In situations coming within the rule stated in this Section, the fact that the one to whom the performance of the duty is delegated acts for his own purposes and with no intent to benefit the principal or master is immaterial.

Illustrations:

Illustrations:

3. P, a railroad, employs A, a qualified conductor, to take charge of a train. A assaults T, a passenger. P is subject to liability to T.

4. P invites T to his home as a social guest. A, P's butler, steals from T. P is not liable to T, unless P was negligent in the selection of A.

5. The chambermaid at a hotel steals the clothes of a traveler stopping at the hotel. The hotel keeper is subject to liability although he reasonably believed the chambermaid to be honest.

Appendix 7

U.S. Department of Labor

Benefits Review Board
1111 20th St., N.W.
Washington, D.C. 20036

BRB No. 83-2484 **PUBLISHED**

AUDREY DEROCHER
(Widow of PERCY DEROCHER)

Claimant-Petitioner

v.

CRESCENT WHARF & WAREHOUSE

Self-Insured
Employer-Respondent

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

Party-in-Interest

FILED AS PART OF THE RECORD

OCT 18 1985

(date)

Linda M. Meekins/RS

Clerk of the Board
Benefit Review Board

DECISION and ORDER

Appeal of the Decision and Order of Vivian Schreter Murray, Administrative Law Judge, United States Department of Labor.

Kathryn E. Ringgold, San Francisco, California, for the claimant.

Albert Sennett (Hanna, Brophy, MacLean, McAleer & Jensen), San Francisco, California, for the employer.

Marianne Demetral Smith (Francis X. Lilly, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Counsel for Benefits Programs), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: RAMSEY, Chief Administrative Appeals Judge, and DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant Audrey Derocher, widow of the deceased employee, appeals the Decision and Order (82-LHC-2592) of Administrative Law Judge Vivian Schreter Murray denying benefits pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act as amended, 33 U.S.C. §901 et seq. (the Act). We must affirm the findings and conclusions of the administrative law judge which are supported by substantial evidence, are rational and are in accordance with law. 33 U.S.C. §921(b)(3); O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965).

The decedent, a longshoreman, worked out of a dispatch hall from 1947 through June 30, 1971. His duties included the loading of asbestos. On April 27, 1978, decedent died as a result of cardiopulmonary arrest due to, or as a consequence of, a metatastic adenocarcinoma. Several months later, claimant learned of the possible relationship between the decedent's employment-related asbestos exposure and his lung cancer while conversing with a neighbor whose husband had died under similar circumstances. In June 1978, claimant obtained counsel. On June 26, 1978, she filed a claim against Pacific Maritime Association (PMA) seeking death benefits for employment-related lung cancer. On May 5, 1980, an amended claim was filed against Maritime Terminals Corporation. On September 23, 1980, a claim was filed against Crescent, decedent's last employer, for injury between 1957 and June 30, 1971. The final claim against Crescent is the subject of this appeal.

The administrative law judge found that claimant knew of the possible relationship between her husband's lung cancer and his employment no later than June 25, 1978, the day preceding the filing of the first claim. Crescent, however, did not receive notice of the injury or death and was thus unaware of the claim until September 23, 1980, when the Department of Labor (DOL) notified Crescent that a claim had been filed against it. Accordingly, the administrative law judge found the claim time-barred pursuant to Section 12 because claimant had failed to notify Crescent within the 30 days provided for by statute [1] or within 30 days from the time that the necessary records identifying Crescent as the last employer became available. The administrative law judge also determined that the failure to file timely notice was not excused pursuant to Section 12(d)(2). [2]

Claimant asserts that the claim was not time-barred pursuant to Section 12(a) because Crescent received timely notice through PMA, its agent, on June 25, 1978. Claimant and Director also contend that the notice to Crescent was timely under Smith v. Aerojet-General Shipyards, Inc., 647 F.2d 518 (5th Cir. 1981). Finally, claimant argues that, even if the notice to Crescent was not timely, the failure to provide notice should have been excused under Section 12(d)(3)(ii). Employer seeks affirmance.

We agree with claimant that the timely notice provided to PMA should be imputed to the employer. The decedent had worked out of a hiring hall run under the joint auspices of PMA and the International Longshore Worker's Union (ILWU). The individual longshoremen, who were hired by PMA, were dispatched through the hiring hall to individual stevedoring companies, such as the

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[1]The 1972 version of Section 12(a), applicable at the time of the hearing, required that notice be given within 30 days of the injury or death or 30 days after the employee or beneficiary was aware or, in the exercise of reasonable diligence, should have been aware of, the relationship between the injury or death and the employment. The notice to PMA was therefore timely under this provision.

[2]The 1972 Act's version of Section 12(d)(2), applicable at the time of the hearing, provided that the failure to provide the statutorily required notice could be excused by the Deputy Commissioner if a satisfactory reason existed as to why notice could not be given. This section is renumbered Section 12(d)(3)(ii) in the 1984 Act. The new numbering will be used hereafter.

employer, who would contact PMA when they needed workers. PMA handled all record-keeping and payroll functions for these companies. When employees were ill, they would contact PMA and the union. Because the longshoremen usually would spend no more than one or two days at a time on assignment for any particular employer, they viewed themselves as employees of PMA rather than employees of the stevedoring companies. In short, PMA functioned as both a timekeeper and personnel office for the stevedoring companies it served. Thus, on the facts presented, when claimant notified PMA of the pending claim, it was reasonable for her to assume that this notice would be communicated to the decedent's last employer.

Congress has codified the imputed notice concept in Section 12(d)(3)(i), 33 U.S.C.A. §912(d)(3)(i), pursuant to the 1984 Amendments. The provision provides in pertinent part:

> Failure to provide notice shall not bar any claim under this Act...(3) if the deputy commissioner excuses such failure on the ground that (i) notice while not given to a responsible official of the employer designated by the employer pursuant to subsection (c) of this section, was given to an official of the employer or the employer's insurance carrier, and that the employer or carrier was not prejudiced due to the failure to provide notice to a responsible official designated by the employer pursuant to subsection(c).

The regulations promulgated pursuant to the 1984 Amendments indicate that, where, as here, no individual has been designated to receive notice, notice may be given to the first line supervisor (including foreman, hatchboss, or timekeeper), local plant manager, or personnel office official. 20 C.F.R. §702.211(b)(1). We therefore conclude that, since claimant provided timely notice to PMA, which functioned as both a timekeeper and personnel office for the employer, this notice was sufficient to save the claim from being time-barred pursuant to Section 12(d)(3)(i).[3]

Smith v. Aerojet, supra, lends further support and is an alternative basis for our holding. In Smith, the Fifth Circuit held that, in an occupational disease claim where there is a succession of employers and a claim is timely filed against a later employer, the Section 12 and Section 13 time limitations do not begin to run against a prior employer until claimant was aware, or should have been aware, that liability could be asserted against that particular employer under the last employer doctrine. (emphasis added). Referring to the notice requirements of Section 12, the court stated:

> An employer cannot reasonably expect notice of potential liability until facts are ascertained that, as a matter of

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[3]At the oral argument, the parties, citing Osmundsen v. Todd Pacific Shipyard, 755 F.2d 730 (9th Cir. 1985), agreed to remand the case to the administrative law judge for consideration on the merits. While the Board agrees that the notice requirements of Section 12 have been met, the Board must determine whether it is necessary to remand this case back to the administrative law judge.

> law, make that employer potentially liable. To hold otherwise would be to require a longshoreman to file numerous notices that at best could provide only the most speculative notice.

Smith at 524. The holding in Smith specifically applies to cases where a later employer is released from liability and a prior employer becomes potentially liable. The logic of Smith, however, applies to the instant claim.

In the instant case, claimant was not aware of the relationship between the decedent's death and his employment until 1978, seven years after the decedent last worked. On December 28, 1978, the claimant began trying to secure information regarding the identity of decedent's last employer. This attempt was frustrated, however, by difficulty in securing a subpoena from the DOL, and by PMA's failure to respond to the subpoena once it was obtained. In addition, a fire destroyed the PMA/ILWU records which could have provided claimant with this information. As a result, claimant was unable to identify Crescent as a potentially liable employer until July 23, 1980. We therefore adopt the rationale of Smith v. Aerojet and conclude that the Section 12 time limitation did not begin to run on the claim against employer until that date.[4] Claimant's notice to Crescent on September 23, 1980 was therefore within the one year time period provided by Section 12(a)[5] as amended in 1984. The administrative law judge's finding that the claim was time-barred must therefore be reversed.[6]

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[4]We therefore reject the administrative law judge's finding that claimant should have been aware that Crescent was the appropriate employer when it searched PMA's records on March 17, 1980.

[5]Under Section 12(a), as amended in 1984, in an occupational disease claim, notice must be filed within one year of the time the employee or claimant becomes aware, or should have become aware, of the relationship between the employment, the disease, and the death or disability. This provision is applicable to pending cases pursuant to Section 28(b) of the 1984 Amendments. Osmundsen, supra.

[6]We need not address claimant's alternative contentions under Section 12(d)(3)(ii) in light of our disposition of the case.

Accordingly, the administrative law judge's Decision and Order is reversed and the case is remanded for reconsideration on the merits.[7]

SO ORDERED.

ROBERT L. RAMSEY, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

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[7]While the administrative law judge appears to have made some findings of fact in the D&O at 2, this discussion is not sufficiently detailed to meet the requirements of the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A). Moreover, contrary to the administrative law judge's finding, Dr. Anthony Cosentino's testimony appears to be sufficient to establish the possibility of a causal relationship between the decedent's employment and his lung cancer. It is unclear, however, whether this testimony was ever admitted into evidence. At the second hearing, the administrative law judge allowed claimant until April 31, 1983 to take Dr. Cosentino's deposition because Dr. Cosentino had been out of town at the time of the initial hearing. The deposition, however, was not taken until May 3, 1983. On remand, the administrative law judge should clarify whether this exhibit was admitted into the record. Such procedural steps are necessary because, on appeal, the Board may consider only evidence admitted in the formal record. 33 U.S.C. §921(b)(3); 20 C.F.R. §802.201. Furthermore, the Administrative Procedure Act, 5 U.S.C. §556(d) and (e), requires that a Decision and Order be issued only on the evidence of record, Williams v. Hunt Shipyards, Geosource Inc., 17 BRBS 32 (1985).

Dated this 18th
day of October 1985

SERVICE SHEET

BRB No. 83-2494: Audrey M. Derocher (Widow of Percy Derocher) v. Crescent Wharf and Warehouse (Case No. 82-LHCA-2593) (OWCP No. 13-539988)

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Appendix 8

33 BRBS 15 (DOL Ben.Rev.Bd.), 1999 WL 197776
*1 NOTE:This is an PUBLISHED LHCA Document.

Benefits Review Board

United States Department of Labor

CARLOS BUSTILLO, Claimant–Respondent
v.
SOUTHWEST MARINE, INCORPORATED
and
LEGION INSURANCE COMPANY, Employer/Carrier–Petitioners
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, Party-in-Interest

BRB No. 98-0824
March 8, 1999

DECISION and ORDER
Appeal of the Decision and Order Awarding Benefits of Paul A. Mapes, Administrative Law Judge, United States Department of Labor.

Stephen Birnbaum, San Francisco, for claimant.
Frank B. Hugg, San Francisco, California, for employer/carrier.

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

Employer appeals the Decision and Order (96–LHC–102, 96–LHC–103) of Administrative Law Judge Paul A. Mapes awarding benefits on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* (the Act). We must affirm the findings of fact and 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).

This appeal involves a claim by claimant, a shipyard worker whose duties included sandblasting and painting, for compensation for the aggravation of his pre-existing asthma by work-related exposure to toxic substances. Claimant worked for employer until November 1, 1992, when he sustained a sandblasting injury to his face.[1] Claimant did not return to work after recovering from his sandblasting injury because his respiratory condition had worsened.

In his initial Decision and Order Awarding Medical Benefits filed November 8, 1996, the administrative law judge found that claimant's asthma was causally related to his employment, but that the claim was not timely filed pursuant to Section 13(b)(2) of the Act, 33 U.S.C. § 913(b)(2). The administrative law judge's finding that the claim was barred under Section 13(b)(2) was based on his determination that claimant was, or should have been, aware of the relationship between his employment, his respiratory condition and his disability no later than October 23, 1992. The administrative law judge concluded that, inasmuch as the claim for respiratory impairment was not filed until October 31, 1994, the claim was not filed within requisite two-year period following claimant's date of awareness pursuant to Section 13(b)(2). Accordingly, the administrative law judge found that while claimant is entitled to medical benefits under Section 7 of the Act, 33 U.S.C. § 907, he was not entitled to disability compensation.[2]

On modification, in a Decision and Order Awarding Benefits issued January 28, 1998, the administrative law judge found that the claim was not barred under Section 13(b)(2) inasmuch as the statute of limitations was tolled pursuant to Section 30(f) of the Act, 33 U.S.C. § 930(f), by employer's failure to file a timely first report of injury under Section 30(a), 33 U.S.C. § 930(a).[3] Next, the administrative law judge found that the claim is not barred by claimant's failure to give timely notice of his injury under Section 12(a) of the Act, 33 U.S.C. § 912(a), inasmuch as employer failed to meet its burden of proof under Section 12(d), 33 U.S.C. § 912(d), that it was prejudiced by claimant's failure to provide timely notice of his injury. The administrative law judge awarded claimant temporary total disability benefits from November 2, 1992 to December 13, 1994, permanent total disability benefits from December 14, 1994 to April 9, 1996, and permanent partial disability benefits commencing April 10, 1996, and granted employer credit for all compensation paid to claimant since November 1, 1992. Lastly, the administrative law judge awarded employer Section 8(f) relief, 33 U.S.C. § 908(f).

***2** On appeal, employer contends that the administrative law judge erred in finding that the claim is not barred under Section 13 and in finding that employer was not prejudiced by claimant's failure to provide timely notice of his injury under Section 12. Claimant responds, urging affirmance.

In the absence of evidence to the contrary, Section 20(b) of the Act, 33 U.S.C. § 920(b), presumes that the notice of injury and the filing of the claim were timely. *See Shaller v. Cramp Shipbuilding & Dry Dock Co.*, 23 BRBS 140 (1989). In the instant case, the administrative law judge found that claimant was, or should have been, aware of the relationship between his employment, his asthma and his disability no later than October 23, 1992. A claim was not filed until October 31, 1994. This was also the first notice of injury received by employer.[4]

Claimant's failure to give employer timely notice of his injury pursuant to Section 12 of the Act is excused if employer had knowledge of the injury or employer was not prejudiced by the failure to give proper notice. 33 U.S.C. § 912(d)(1), (2). Prejudice under Section 12(d)(2) is established where employer provides substantial evidence that due to claimant's failure to provide timely written notice, it was unable to effectively investigate 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 was fresh is insufficient to meet employer's burden of proof. *See Kashuba v. Legion Ins. Co.*, 139 F.3d 1273, 32 BRBS 62 (CRT) (9th Cir.1998), *cert. denied* 119 S.Ct. 866 (1999); *ITO Corp. v. Director, OWCP [Aples]*, 883 F.2d 422, 22 BRBS 126 (CRT) (5th Cir.1989); *Bivens v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 233 (1990).

In his January 28, 1998 Decision and Order, the administrative law judge, noting that the only specific allegation of prejudice made by employer was that claimant's failure to provide timely notice precluded employer from obtaining Dr. Lee's treatment notes, determined that the unavailability of Dr. Lee's notes actually strengthened employer's case. The administrative law judge concluded, therefore, that employer failed to meet its burden of proving that it was prejudiced by claimant's failure to provide timely notice. We note that, on appeal, employer does not assign error to the administrative law judge's finding that employer's inability to obtain Dr. Lee's records did not prejudice employer. Rather, employer asserts on appeal that the delay in receiving notice made it difficult to identify witnesses and precluded employer from supervising claimant's medical care. We reject employer's arguments and affirm the administrative law judge's determination that employer was not prejudiced by claimant's failure to provide timely notice.

We note, first, that employer's conclusory allegation on appeal that the delayed notice made the identification of witnesses difficult is unsupported by evidence in the record. Indeed, our review of the hearing testimony of Paul Harris, the claims administrator who handled the claim for employer, indicates that Mr. Harris conceded that any potential difficulty in identifying witnesses did not prejudice him in investigating this particular claim. *See* Hearing Tr. at 346–355. Moreover, while employer generally asserts that it was prejudiced by its inability to supervise claimant's medical care, it does not allege that the medical care received by claimant was inappropriate. The instant case is thus distinguishable from *Kashuba*, in which the United States Court of Appeals for the Ninth Circuit held that, had timely notice allowed the employer to participate in the claimant's medical care, the employer might have been able to take measures to prevent the claimant from suffering additional disability and possibly to avoid surgery. 139 F.3d at 1276, 32 BRBS at 64 (CRT). As employer in the case at bar fails to support its generalized assertion of prejudice based on the delay in its ability to supervise claimant's medical care

with any evidence that such supervision would have altered the course of claimant's medical treatment, we reject employer's assertion that it was prejudiced on this basis. Consequently, we affirm the administrative law judge's determination that Section 12 does not bar claimant's claim.

*3 Employer also argues that the claim is barred by the two-year limitations period of Section 13(a), (b)(2), since the claim was filed over two years after claimant's October 23, 1992, date of awareness.[5] As we previously noted, Section 20(b) of the Act provides a presumption that the claim was timely filed; to overcome the Section 20(b) presumption, employer must preliminarily establish that it complied with the requirements of Section 30(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 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); *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 v. Container Stevedoring Co.*, 25 BRBS 210 (1991). *See also Stark v. Washington Star Co.*, 833 F.2d 1025 (D.C.Cir.1987). Knowledge of the work-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).

In the instant case, employer did not file the Section 30(a) report of injury until November 2, 1994; employer, argues, however, that it did not have knowledge of the injury for Section 30 purposes prior to the filing of the claim on October 31, 1994. Employer contends on appeal that it was erroneous for the administrative law judge to **impute knowledge** to the employer on the basis of the receipt by Mr. Harris, employer's **claims administrator**, of Dr. Cappozzi's medical report dated December 3, 1993, Cl.Ex. 11, and claimant's attorney's letter dated May 27, 1994, Cl.Ex. 9. We disagree, and hold that the administrative law judge rationally concluded that the information contained in Dr. Cappozzi's report and claimant's counsel's letter was sufficient to impute to employer the knowledge that claimant suffered from a work-related respiratory impairment 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. We note, in this regard, that the administrative law judge first found that Dr. Cappozzi's report stating that claimant had not worked since January 16, 1993, because of chronic asthma provided employer with the knowledge that claimant had missed work due to asthma. Next, the administrative law judge found that employer was given sufficient reason to believe the asthma could be work-related, and, thus, was apprised of possible compensation liability, by claimant's counsel's letter requesting that the issue of claimant's asthma be resolved in the state forum[6] with an agreed medical examiner.[7] We therefore affirm the administrative law judge's determination that employer had knowledge that claimant sustained a work-related injury with possible compensation liability as of June 1994, when Mr. Harris received claimant's attorney's letter. Employer's knowledge as of that date, combined with employer's failure to file the required Section 30(a) report of injury within the requisite ten days, thus tolls the Section 13 statute of limitations. *See Steed*, 23 BRBS at 218–219. We therefore affirm the administrative law judge's finding that the instant claim was timely filed.

*4 Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge
ROY P. SMITH
Administrative Appeals Judge
JAMES F. BROWN
Administrative Appeals Judge

Footnotes

1 Claimant's sandblasting injury was the subject of a separate claim and is not relevant to the instant appeal.

2 Thereafter, claimant filed a motion for reconsideration of the administrative law judge's Decision and Order. By Order dated December 4, 1996, the administrative law judge denied claimant's motion as untimely filed. The administrative law judge noted that information set forth in claimant's motion suggested that the Section 13(b)(2), 33 U.S.C. § 913(b)(2), limitations period may have been tolled under the provisions of Sections 13(d) and 30(f), 33 U.S.C. §§ 913(d), 930(f), and that, therefore, there could be grounds for modifying the Decision and Order under Section 22, 33 U.S.C. § 922. Accordingly, the administrative law judge ordered the parties to show cause why a Section 22 hearing should not be held for the purpose of determining whether the Section 13(b)(2) limitations period had been tolled.
Both employer and claimant thereafter filed appeals with the Board. BRB Nos. 97–0462/A. On January 13, 1997, the administrative law judge issued a Notice of Intent to Conduct a Section 22 Hearing to determine whether there was a mistake of fact concerning the statute of limitations. By Order dated May 16, 1997, the Board dismissed both employer's and claimant's appeals as untimely filed, and remanded the case to the administrative law judge for Section 22 modification proceedings.
A Section 22 hearing on the statute of limitations issue was held on September 22, 1997, followed by oral argument on December 17, 1997. The administrative law judge determined that a mistake in fact in the initial Decision and Order warranted modification of that decision, and, accordingly, on January 28, 1998, issued the Decision and Order Awarding Benefits that is the subject of the instant appeal.

3 The administrative law judge determined that the tolling provision of Section 13(d) of the Act, 33 U.S.C. § 913(d), is not applicable to the instant case.

4 In an occupational disease case such as this one, claimant must give employer notice of his injury within one year of his awareness of the relationship between the employment, the disease and the disability. 33 U.S.C. § 912(a).

5 The occupational disease provisions of Section 13(b)(2), 33 U.S.C. § 913(b)(2), which apply to the instant claim, provide that a timely claim is one which is filed within two years of claimant's awareness of the relationship between the employment, the disease and the disability.

6 We note that application of Section 30(f) does not require employer to have definite knowledge that the injury comes within the jurisdiction of the Act; the fact that the claim may arise under a state workers' compensation law does not excuse employer's failure to file a Section 30(a) report. *See Spear v. General Dynamics Corp.*, 25 BRBS 132 (1991).

7 As noted by the administrative law judge, receipt of claimant's counsel's letter prompted Mr. Harris to forward the letter to employer's attorney with the notation "asthma?!." *See* Hearing Tr. at 329–331. Thus, the administrative law judge rationally found that the information in claimant's counsel's letter did, in fact, apprise employer of the need for further investigation. *See* Decision and Order at 5–6.

33 BRBS 15 (DOL Ben.Rev.Bd.), 1999 WL 197776

25 BRBS 210 (DOL Ben.Rev.Bd.), 1991 WL 335134

Benefits Review Board

United States Department of Labor

FRANK STEED, Claimant-Respondent
v
CONTAINER STEVEDORING COMPANY, Self-Insured Employer-Petitioner Cross-Respondent
PASHA MARITIME SERVICES
and
INDUSTRIAL INDEMNITY COMPANY, Employer/Carrier-Respondents, Cross-Petitioners
MARINE TERMINALS CORPORATION
and
MAJESTIC INSURANCE COMPANY, Employer/Carrier-Respondents, Cross-Petitioners
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, Respondent

BRB Nos. 90-1827 90-1827A and 90-1827B
October 29, 1991

DECISION and ORDER

***1** Appeals of the Decision and Order and Order on Reconsideration of Alexander Karst, Administrative Law Judge, United States Department of Labor.

John R. Hillsman (McGuinn, Hillsman & Palefsky), San Francisco, California, for claimant.
Andrew I. Port (Graham & James), San Francisco, California, for Container Stevedoring Company.
Bill Parrish, San Francisco, California, for Pasha Maritime Services and Industrial Indemnity Company.
Gerald A. Falbo (Laughlin, Falbo, Levy & Moresi), San Francisco, California, for Marine Terminals Corporation and Majestic Insurance Company.
Joshua T. Gillelan II (David S. Fortney, Deputy Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: STAGE, Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.
PER CURIAM:

Container Stevedoring Company (Container) appeals, and Marine Terminals Corporation (Marine Terminals) and Pasha Maritime Services (Pasha) cross-appeal the Decision and Order and Order on Reconsideration (89-LHC-929) of Administrative Law Judge Alexander Karst awarding benefits on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 et seq. (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965). The Board heard oral argument in this case in San Francisco, California, on May 24, 1991.[1]

Claimant has engaged in longshore employment since 1956. His work history includes five back injuries. After claimant's third back injury in March 1971, he began treating with Dr. Kenefick, who advised claimant to limit his work to light-duty. Claimant also was advised that his back gradually would worsen and that he eventually would require surgery. From 1971 to March 1986 claimant had chronic low back pain of varying intensity; however, he was able to perform light-duty longshore employment. In March 1986 claimant was reexamined by Dr. Kenefick after an episode of severe back pain. Dr. Kenefick

diagnosed lumbar stenosis. Claimant was off work from March 10 to April 2, 1986. Pursuant to a settlement agreement with the employers with whom he was employed when he suffered his back injuries in 1968 and 1971, claimant's medical bills for his treatment and testing with Dr. Kenefick were paid, but he received no additional compensation. On October 19, 1986, claimant felt severe back pain after working for Container. He was reexamined by Dr. Kenefick, who repeated his March 1986 recommendation that claimant have a decompressive laminectomy from L3-4 to the sacrum, which was scheduled for November 4, 1986. The employers involved with the 1968 and 1971 injuries, however, refused to authorize payment for the surgery. Claimant's health insurance carrier also refused to pay for the work-related surgery. Since claimant could not obtain authorization for the surgery, he returned to work on November 14, 1986.

***2** On October 14, 1988, claimant filed his claim for benefits under the Act against Container. Claimant sought compensation for temporary total disability, 33 U.S.C. §908(b), from March 10, 1986, to April 2, 1986, and from October 23, 1986, to November 14, 1986, and medical benefits as future treatment of claimant's lumbar stenosis would require. Since claimant contended that his injury was due in part to the repeated trauma caused by his regular longshore employment, Container joined claimant's employers after he last worked for Container on October 19, 1986 — Pasha, Marine Terminals, and California Stevedoring & Ballast Company. At the formal hearing these employers moved that they be dismissed because the claim was limited to compensation through November 14, 1986. Additionally, Pasha sought its dismissal, alleging that a Section 8(i), 33 U.S.C. §908(i), settlement with claimant for a 1987 injury discharged it from any further liability. These employers also moved to recover their costs from Container, including attorneys' fees, pursuant to Section 26 of the Act. 33 U.S.C. §926. The administrative law judge found that these employers were improperly joined and dismissed them at the formal hearing. In his Decision and Order and Order on Reconsideration, the administrative law judge awarded these employers costs against Container pursuant to Section 26, but he denied reimbursement for their attorneys' fees.

Addressing the merits of the claim, the administrative law judge found that claimant established that the aggravation of his lumbar stenosis caused by walking and standing at work was an occupational disease. On the basis that claimant has an occupational disease, he therefore found the claim timely filed under Section 13(b) of the Act, 33 U.S.C. §913(b), as it was filed within two years of the date of awareness, which the administrative law judge found was November 10, 1986. The administrative law judge also found that, although claimant conceded his formal notice of injury to Container in October 14, 1988 was untimely, the Pacific Maritime Association (PMA) had knowledge of the injury, and that this knowledge must be imputed to Container, since PMA is its agent. Alternatively, the administrative law judge found that Container failed to establish any resulting prejudice from the untimely notice. He therefore found that claimant's failure to give timely notice of injury was excused pursuant to Section 12(d) of the Act, 33 U.S.C. §912(d)(Supp. V 1987). Finally, the administrative law judge found that Container is the responsible employer based on his finding that claimant became aware on November 10, 1986, of the relationship between his stenosis and the cumulative effects of his ongoing work activities and the parties' stipulation that it was the last employer for whom claimant worked prior to this date. The administrative law judge ordered Container to pay for the medical expenses resulting from the treatment of claimant's lumbar stenosis, and temporary total disability benefits from March 10 to April 2, 1986, and from October 23, 1986 to November 14, 1986. 33 U.S.C. §908(b).

***3** On appeal, Container challenges the administrative law judge's findings that the aggravation of claimant's lumbar stenosis is an occupational disease, that the claim is not barred by Sections 12 and 13 of the Act, 33 U.S.C. §§912, 913, and that it is the responsible employer. Claimant and the Director, Office of Workers' Compensation Programs (the Director), respond urging affirmance of the issues raised on appeal by Container. Marine Terminals cross-appeals the administrative law judge's denial of its attorney's fee as a recoverable cost under Section 26. Container responds, urging affirmance of this finding.

OCCUPATIONAL DISEASE

Container argues that the administrative law judge erred by finding that the aggravation of claimant's lumbar stenosis is an occupational disease. The administrative law judge found that claimant's lumbar stenosis was aggravated by prolonged walking and standing, which is a continuous requirement of claimant's longshore employment. In the absence of controlling authority from the United States Court of Appeals for the Ninth Circuit, within which circuit this case arises, the administrative law judge followed Director, OWCP v. General Dynamics Corp. (Morales), 769 F.2d 66, 17 BRBS 130 (CRT) (2d Cir. 1985). In Morales, the United States Court of Appeals for the Second Circuit stated in dicta that there was no apparent reason that the aggravation of a pre-existing condition arthritic in nature could not be treated as an occupational

disease. Morales, 769 F.2d at 68, 17 BRBS at 133 (CRT). Applying Morales and well-established case law that employers must accept their employees' predisposition to injury, see generally J.V. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967), and the aggravation rule, see generally Wheatley v. Adler, 407 F.2d 307 (D.C. Cir. 1968), the administrative law judge concluded that the work-related aggravation of claimant's lumbar stenosis therefore is a compensable occupational disease.

Subsequent to the Morales decision and the administrative law judge's Decision and Order, the Board decided Gencarelle v. General Dynamics Corp., 22 BRBS 170 (1989), aff'd, 892 F.2d 173, 23 BRBS 13 (CRT)(1989). In Gencarelle, the claimant alleged that his synovitis of the knee, an arthritic condition aggravated by repeated bending, stooping and climbing on the job, is an occupational disease. The Board held that claimant's synovitis was not an occupational disease because there was no evidence that synovitis is an inherent hazard to others in employment similar to claimant's; rather, claimant's synovitis was unique to him. Gencarelle, 22 BRBS at 173. The Board noted that an injury may occur over a gradual period of employment and still be construed as accidental. Id.; see generally Pittman v. Jeffboat Inc., 18 BRBS 212 (1986). The United States Court of Appeals for the Second Circuit affirmed the Board's holding that claimant's synovitis is an accidental injury and not an occupational disease. The court reasoned that this condition is not "peculiar to" claimant's employment because bending, stooping and climbing are common to many occupations and to life in general. Gencarelle, 892 F.2d at 177-178, 23 BRBS at 19-20 (CRT).[2]

***4** Applying the holdings in Gencarelle to the medical evidence and relevant facts in the instant case results in a conclusion that claimant does not have an occupational disease under the Act. The administrative law judge credited claimant's treating physician, Dr. Kenefick, who opined on November 10, 1986, that claimant's lumbar stenosis was "added to" by his ongoing life and work activities. His March 13, 1986, report records claimant's complaint that his symptomatology is exacerbated by the walking requirements of his longshore employment. On October 19, 1986, claimant's last day with Container, he worked as a clerk, which required that he walk and stand much of the day. Accordingly, the record contains substantial evidence to support the administrative law judge's finding that claimant's lumbar stenosis was aggravated by his light-duty employment from 1971 to 1986. The gradual work-related aggravation of claimant's lumbar stenosis, however, is an accidental injury. Pittman, supra. It is not an occupational disease because walking and standing are not peculiar to claimant's employment, Gencarelle, supra, 892 F.2d at 177, 23 BRBS at 19-20 (CRT), nor is there any evidence that others in employment similar to claimant's develop lumbar stenosis, Gencarelle, supra, 22 BRBS at 173. Accordingly, we reverse the administrative law judge's finding that lumbar stenosis is an occupational disease, and hold, as a matter of law, that claimant sustained a gradual work-related accidental injury. Pittman; see also Gardner v. Bath Iron Works Corp., 11 BRBS 556 (1979), aff'd, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981). As a result, we also reverse the administrative law judge's finding that claimant's claim was subject to the occupational disease provisions of Section 13(b)(2). See discussion, infra.

SECTIONS 12 and 13

Container argues that the administrative law judge erred by not finding the claim barred pursuant to Sections 12 and 13 of the Act. The administrative law judge found that claimant first became aware that his stenosis was aggravated by walking and standing at work on November 10, 1986. A claim was not filed, however, until October 14, 1988. This was also the first notice of injury received by Container. Claimant testified that despite his and his attorney's attempts in November 1986 to obtain the identity of his longshore employers in 1986 from PMA, a response was not furnished until October 1988; thereafter, the claim was filed.

In the absence of evidence to the contrary, Section 20(b) of the Act, 33 U.S.C. §920(b), presumes that the notice of injury and the filing of the claim were timely. See Shaller v. Cramp Shipbuilding & Dry Dock Co., 23 BRBS 140 (1989). The administrative law judge noted that claimant conceded he did not provide timely notice to Container pursuant to Section 12.[3] Section 12(d)(1), (2) provides that if the employer had knowledge of the injury or if the employer was not prejudiced, failure to provide timely notice will not bar the claim. 33 U.S.C. §912 (a), (d) (Supp. V 1987); Sheek v. General Dynamics Corp. 18 BRBS 151 (1986), decision on recon. modifying 18 BRBS 1 (1985). To establish prejudice, the employer bears the burden of proving by substantial evidence that it has been unable to effectively investigate some aspect of the claim due to claimant's failure to provide timely notice pursuant to Section 12. Bivens v. Newport News Shipbuilding & Dry Dock Co., 23 BRBS 233 (1990). Container argues that it was prejudiced by receiving notice in October 1988 because it was unable to effectively investigate claimant's April 1987 work injury with Pasha, which deprived it of the opportunity for a meaningful medical

defense.[4]

***5** The administrative law judge determined that Container was not prejudiced by receiving formal notice in October 1988, and therefore that claimant's untimely notice was excused pursuant to Section 12(d)(2). See Sheek, supra. The administrative law judge found that, assuming Container did not receive notice until October 1988, it had seven and a half months before the hearing to arrange for an independent medical exam, and it submitted the report of Dr. Adams, which was based on claimant's medical records. Furthermore, Container was able to produce Dr. Kenefick's medical records, which fully document the nature and extent of claimant's injury.

In addition to the evidence credited by the administrative law judge, the record also contains a report of a July 9, 1987, independent medical exam by Dr. Bernstein addressing the April 1987 injury, which concluded that claimant sustained only a temporary aggravation. Emp. Ex. 7. The administrative law judge's finding that Container was not prejudiced by the late notice of injury is therefore rational and supported by substantial evidence. Furthermore, based on Dr. Kenefick's opinion the administrative law judge found that claimant was totally disabled and in need of a lumbar laminectomy in November 1986 after he last worked for Container. Claimant did not seek compensation benefits after November 14, 1986. The April 1987 injury is therefore not a basis for establishing prejudice regarding the claim against Container. Accordingly, Container failed to carry its burden of establishing prejudice, Bivens, supra, and we therefore affirm the administrative law judge's finding that claimant's failure to give timely notice of injury under Section 12 does not bar this claim.

Container also argues that the claim is barred by the one year limitations period of Section 13(a), since the claim was filed about two years after claimant's November 10, 1986, date of awareness. As we noted earlier, the administrative law judge erroneously applied the two year limitations period of Section 13(b)(2), which is applicable to occupational diseases, to find that the claim was timely filed. See Gencarelle, 22 BRBS at 173. In the case of accidental injury, claimant has one year to file a claim after he knows that his work-related injury has resulted in an impairment of wage-earning capacity. See J. M. Martinac Shipbuilding v. Director, OWCP, 900 F.2d 180, 23 BRBS 127 (CRT) (9th Cir. 1990), aff'g on other grounds Grage v. J.M. Martinac Shipbuilding, 21 BRBS 66 (1988).

In order to overcome the Section 20(b) presumption with regard to Section 13, Container must prove it filed a first report of injury as required by Section 30(a) of the Act, 33 U.S.C. §930(a), or else the running of the statute of limitations is tolled pursuant to Section 30(f), 33 U.S.C. §930(f). See Ryan v. Alaska Constructors, Inc., 24 BRBS 65 (1990). For Section 30(a) to apply, the employer or its agent must have notice of the injury under Section 12 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 Stark v. Washington Star Co., 833 F.2d 1025 (D.C. Cir. 1987). In this case, there is no Section 30(a) report in the record. Container, moreover, does not dispute the administrative law judge's finding that PMA is its agent. See Emp. Exs. 4, 5. See also Derocher v. Crescent Wharf & Warehouse, 17 BRBS 249 (1985). Thus, if Container or its agent PMA had the requisite knowledge, the claim is not barred by Section 13 because the running of the statute of limitations was tolled pursuant to Section 30(f). Ryan, supra. Knowledge of the work-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. Kulick v. Continental Baking Corp., 19 BRBS 115 (1986).

***6** The administrative law judge addressed Container's knowledge of the claim when he found that claimant's failure to provide timely notice was excused pursuant to Section 12(d)(1).[5] The administrative law judge credited claimant's counsel's letter to PMA dated November 25, 1986, which stated he wished to learn the identity of all of claimant's employers between October 1, 1985, and November 25, 1986, as the firm had been retained to represent claimant in connection with a waterfront injury. Cl. Ex. 1. The administrative law judge also found that claimant personally visited the PMA offices in an attempt to obtain the same information. Tr. at 100-103. The administrative law judge found that these repeated contacts with PMA were sufficient to apprise PMA that compensation liability was possible against one of its members. The administrative law judge concluded that these contacts, coupled with evidence that PMA kept a detailed history on claimant and his prior injuries, should have caused a prudent person to investigate the matter further and that PMA's knowledge must be imputed to Container.

We hold that the administrative law judge rationally credited the above evidence and concluded it was sufficient to impute to Container the knowledge that claimant sustained a work-related injury and thus that it should have concluded that compensation liability was possible. See generally Cordero v. Triple A Machine Shop, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), cert. denied, 440 U.S. 911 (1979). We therefore affirm the administrative law judge's finding that Container had knowledge of the injury in November 26, 1986. Kulick, supra. Container proffered no evidence that it filed the required Section 30(a) first report of injury, and thus the Section 13 statute of limitations was tolled pursuant to Section 30(f). See Ryan, supra. Container, therefore, cannot overcome the Section 20(b) presumption that the claim was timely filed under Section 13. See Shaller, supra. Accordingly, we hold that, as a matter of law, the claim filed on October 18, 1988, was timely under the facts of this case.

RESPONSIBLE EMPLOYER

Container argues that it is not the responsible employer under Travelers Ins. Co. v. Cardillo, 225 F.2d 137 (2d Cir.), cert. denied, 350 U.S. 913 (1955), because this is not an occupational disease case; alternatively, Container maintains it is not the responsible employer, because claimant was aware of the work-relatedness of his injury by April 30, 1986, and that in cases of occupational disease the responsible employer is the last employer to expose claimant to injurious stimuli prior to his date of awareness. Dr. Kenefick's March 13 and April 30, 1986, reports include his stenosis diagnosis and surgery recommendation. The administrative law judge applied Cardillo, supra, and credited claimant's testimony that he became aware that his employment with Container on October 19, 1986 aggravated his lumbar stenosis when he was so informed by Dr. Kenefick in November 1986, and that before this time, he believed his back condition stemmed from the prior injuries. Although Dr. Kenefick diagnosed stenosis in March 1986, the administrative law judge found that he treated the injury at that time as if it solely arose from claimant's prior work-related injuries. Claimant's medical bills were sent to and paid by the employers from his 1968 and 1971 injuries. Based on the parties' stipulation that Container was claimant's last employer prior to November 10, 1986, the administrative law judge found that it was the responsible employer.

***7** The administrative law judge erred by relying on Cardillo, supra, which is inapplicable in cases of accidental injury. In this case, claimant sustained an accidental injury from the combination of his pre-existing lumbar stenosis and the walking and standing requirements of his longshore employment. See Pittman, supra. Accordingly, in this case, the responsible employer is the employer for whom claimant worked at the time of the injury (i.e., the last aggravation), regardless of claimant's date of awareness.[6] See generally Kelaita v. Director, OWCP, 799 F.2d 1308 (9th Cir. 1986), aff'g Kelaita v. Triple A Machine Shop, 17 BRBS 10 (1984); see also Pittman, supra. Employer's argument that the responsible employer is the employer for whom claimant last worked before his alleged date of awareness on April 30, 1986, is therefore rejected.

The administrative law judge found that claimant was totally disabled after he returned to work on November 14, 1986, and employer does not appeal this finding. Although disabled, he determined that claimant was required to work because he was unable to obtain authorization from any insurer for his surgery. Claimant, therefore, limited his claim to compensation to the periods he was unable to work in 1986 due to back pain and to medical treatment. The parties stipulated that claimant last worked for Container on October 19, 1986, after which the administrative law judge found that claimant became totally disabled based on the opinion of Dr. Kenefick. Moreover, Dr. Kenefick's testimony supports the conclusion that claimant's employment on September 19, 1986, aggravated his condition, resulting in the recommendation that claimant undergo a lumbar laminectomy. See Emp. Ex. at 147. Accordingly, we affirm on other grounds the administrative law judge's finding that Container is the responsible employer as it was claimant's employer when he sustained the last aggravation that forms the basis of the claim. Abbott v. Dillingham Marine & Manufacturing Co., 14 BRBS 453 (1981), aff'd mem. sub nom. Willamette Iron & Steel Co. v. Director, OWCP, 698 F.2d 1235 (9th Cir. 1982).

SECTION 26

Marine Terminals cross-appeals the administrative law judge's Decision and Order and Order on Reconsideration awarding it costs, but not its attorney's fees, pursuant to Section 26 of the Act, 33 U.S.C. §926. Marine Terminals was joined to the action by Container; however, the administrative law judge dismissed it prior to the formal hearing. Marine Terminals argued that the joinder was frivolous since claimant worked for it after the November 14, 1986, date through which claimant sought benefits. The administrative law judge found that Marine Terminal was improperly joined, and awarded it costs payable by

Container pursuant to Section 26. He rejected its argument, however, that an attorney's fee is recoverable as costs under Section 26. On appeal, Marine Terminals argues that attorney's fees are recoverable under Section 26.

***8** Section 26 of the Act states:
If the court having jurisdiction of the proceedings in respect of any claim or compensation order determines that the proceedings in respect of such claim or order have been instituted or continued without reasonable ground, the costs of such proceedings shall be assessed against the party who has so instituted or continued the proceedings.

33 U.S.C. §926. The Board has recently addressed the issue of the compensability of attorney's fees under Section 26. In Toscano v. Sun Ship, Inc., 24 BRBS 207 (1991), the Board held that attorney's fees may not be considered costs within the meaning of Section 26, and thus cannot be assessed against any party pursuant to that section. Toscano, 24 BRBS at 212-214. The administrative law judge therefore properly denied Marine Terminals' request for an assessment of its attorney's fees against Container pursuant to Section 26.

Accordingly, the administrative law judge's Decision and Order and Order on Reconsideration are affirmed. Pasha's cross-appeal, BRB No. 90-1827A, is dismissed.

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge
ROY P. SMITH
Administrative Appeals Judge
JAMES F. BROWN
Administrative Appeals Judge

Footnotes

1 By order dated April 2, 1991, Pasha Maritime Services was ordered to show cause why its cross-appeal, BRB No. 90-1827A, should not be dismissed for failure to file a Petition for Review and brief. See 20 C.F.R. §§802.211, 802.218(b), 802.402(a). Pasha responded by requesting that its appeal be withdrawn, also noting that it would not participate in the oral argument. We hereby dismiss Pasha's cross-appeal. BRB No. 90-1827A.

2 Generally, there are two characteristics of an occupational disease: 1) an inherent hazard of continued exposure to conditions of a particular employment; and 2) gradual rather than sudden onset. 1B A. Larson, Workmen's Compensation Law §41.31 (1987); Gencarelle, 22 BRBS at 173. The United States Court of Appeals for the Second Circuit has essentially broken the first element into two subelements - "hazardous conditions" that are "peculiar to" one's employment as opposed to other employment generally. Gencarelle, 892 F.2d at 177-178, 23 BRBS at 18-19 (CRT).

3 In a traumatic injury case such as this one, claimant must give employer notice of his injury within 30 days of his awareness of the relationship between the injury and the employment.

4 Because claimant was unable to obtain authorization from any source for the surgery, he continued working until the formal hearing. On April 25, 1987, while working for Pasha, claimant sustained another lower back injury when he fell on his buttocks. He filed a claim under the Act. Pasha voluntarily paid compensation for six weeks' temporary total disability and medical benefits. In August 1988 Pasha and claimant settled the claim for $15,000, and claimant released any entitlement to future medical care. The settlement was approved on October 5, 1988 pursuant to Section 8(i) of the Act.

5 Under Section 12(d)(1), failure to give timely notice shall not bar the claim if employer or his agent or other responsible officials designated by employer had knowledge of the injury. 33 U.S.C. §912(d)(1)(Supp. V 1987). We note that we need not address the propriety of this finding for purposes of Section 12 as we have affirmed the administrative law judge's finding that Container was not prejudiced by the lack of timely notice of injury under Section 12(d)(2).

6 We reject Container's contention that claimant raised the aggravation theory of recovery for the first time in his response brief. Implicit in Container's argument is that if claimant's condition is not an occupational disease, it is an accidental injury subject to the aggravation rule.

25 BRBS 210 (DOL Ben.Rev.Bd.), 1991 WL 335134

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