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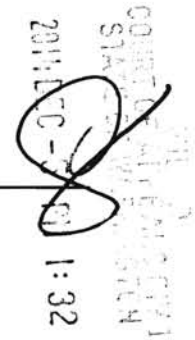
Court of Appeals No. 71526-7-I

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 REPLY BRIEF

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ORIGINAL

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I. FARMERS HAD IMPUTED KNOWLEDGE OF FACTS KNOWN TO LIBERTY MUTUAL

A. LIBERTY MUTUAL WAS FARMERS' AGENT

Farmers argues that agency law does not apply without proof that Farmers controlled the day-to-day activities of Liberty Mutual and the manner in which Liberty Mutual carried out its adjusting functions. No such showing is required. Rather, the requisite control concerns the principal's ability to dictate the nature and scope of services to be provided and to terminate the agency at will. *Restatement (Third) of Agency § 1.01 (2006)* cmts. c and f; App. "AA." The comments to *Restatement (Second) of Agency §14 (1958)* specifically address and reject Farmers' interpretation of the requisite control:

> The control of the principal does not, however, include control at every moment; ***its exercise may be very attenuated*** and, as where the principal is physically absent, may be ineffective (emphasis added). Restatement (Second) of Agency §14 (1958) cmt. a; App. "BB."

The fallacy in Farmers' offered definition of control is best exemplified by reference to the attorney client relationship. Attorneys regularly exercise independent judgment and make daily tactical decisions without consulting the client. Indeed attorneys are hired because they have the training and skills that enable them to handle legal issues that the client cannot handle itself. Yet the attorney client relationship is considered to be the "quintessential" agency relationship. *C.I.R v. Banks*, 543 U.S. 426, 436 (2005). The "control" that renders the relationship one

of agency is that the attorney is obligated to act in the best interests of the client and the client retains the authority to make decisions that affect the subject matter of the retention. *Id.* Such is the case with architects, brokers, factors and auctioneers all of whom, by virtue of their specialized skill, could not possibly carry out their contracted duties if subject to the day to day control of their clients. Yet all of these relationships are governed by agency law. *Denaxas v. Sandstrone Court of Bellevue*, 148 Wn.2d 654 (2003); *Restatement (Second) of Agency §1 cmt. on subsection 3e (1958)*. App. "CC," p. 3.

Consistent with this authority, an agency relationship arises when a company contracts with a third party to administer employee disability claims and knowledge of the agent is thereafter imputed to the principal. *Goodman v. Boeing Co.*, 75 Wn.App. 60, 85-86 (1994); *Derocher v. Crescent Wharf & Warehouse*, BRB 83-2484 (1985)(employer's third party benefits administrator is employer's agent and its knowledge is imputed to employer); *Steed v. Container*, 25 BRBS 210 (1991)(third party benefits administrator for employer/stevedoring company is agent of employer giving rise to imputed knowledge); *Bustillo v. Southwest*, 33 BRBS 15 (1999) (notice to the employer's claims administrator was imputed to the employer), App. EE, FF and GG.

Farmers does not cite a single case in which a relationship analogous to the one presented here has been found to be anything other

than an agency. While Farmers summarily "defines " Liberty Mutual as "service provider," as opposed to an agent, it provides no definition for such a term or the way in which its relationship with Liberty Mutual differs from the relationship between Boeing and Axia in *Goodman*. Although Goodman is directly on point, Farmers devotes a single paragraph to the case and summarily dismisses it as inapposite.[1]

Farmers cites three cases for the proposition that Liberty Mutual was not an agent: *Moss v. Vadman*, 77 Wn.2d 396 (1969); *Stansfeild v. Douglas County*, 107 Wn.App. 1 (2001); and *Hewson Contr. v. Reintree Corp.*, 101 Wn.2d 819 (1984). None of these cases involves a relationship that is even remotely similar to the one presented here. *Moss* involves a dispute between a buyer and seller in a real estate transaction. *Stansfield* addresses the question of whether a county is the agent of a state. *Hewson* examines whether a real estate developer is the agent of the individual home owners thereby making the homeowners liable for money that the developer failed to pay to one of its subcontractors.

Because the trial court refused to apply agency law, the jury was lead to believe that Farmers' plausible deniability defense was supported by law. This directly affected the outcome of the case and thereby mandating a reversal of judgment. *Mackay v. Acorn Custom Cabinetry,*

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1 Farmers suggests that Willhite conceded that agency law does not apply when his attorney stated that he would not argue imputed knowledge. This was not an act of concession but, rather, counsel's assurance to the court that he understood and intended to honor the court's prior ruling denying imputed knowledge.

Inc., 127 Wn.2d 302, 311 (1995).

Even if Farmers could re-define the requisite level of control required to give rise to an agency relationship, it would still be subject to the rule of imputed knowledge. This is because the law will not allow one to avoid liability for the failure to perform a statutory duty by delegating performance of that duty to a third party, irrespective of the right to control. *Landstar Inway Inc. v. Samrow*, 181 Wn.App. 109, 131(2014); *Chicago Title Ins. Co. v. Washington State Office of Ins. Com'r*, 178 Wn.2d 120, 136 and 143-44 (2013); *Millican v. N.A. Gegerstrom, Inc.*, 177 Wn.App. 881, 890-91 (2013); Restatement (Third) of Agency § 7.06 (2006). App. DD. While one is entitled to delegate the ***performance*** of a statutory duty, the principal remains answerable to those for whom the duty exists, as though the principal carried out the duties itself. *Millican*, 177 Wn.App. at 896-97. Here, Farmers has a statutory duty to carry out the provisions of the state and federal medical leave laws. There is no "good faith" defense for a violation of these laws. *Liu v. Amway Corp.*, 347 F.3d 1125,1135 (2003); *Bachelder v. America West Airlines, Inc.* 259 F.3d 1112, 1130 (2001); *Trans World Airlines, Inc., v. Thurston*, 469 U.S. 111, 130 (1985).

While Farmers is entitled to delegate to Liberty Mutual its duties under the medical leave laws, the law regards Liberty Mutual and Farmers to be one and the same. It is undisputed that Liberty Mutual knew the

nature and extent of Willhite's disability and of the restrictions on his return to work status. Farmers is deemed to have the same knowledge. Were such not the case, an employer could effectively avoid all liability under the medical leave laws by contracting with a third party administrator to carry out those duties. Because the trial court refused to find imputed knowledge, the jury was led to believe that Farmers legally delegated to Liberty Mutual all duties it owed to Willhite under the medical leave laws. This is contrary to law and public policy and mandates a reversal of the judgment.

B. FARMERS CANNOT DENY NOTICE GIVEN PURSUANT TO ITS OWN POLICY

Contrary to the respondent's brief, Willhite does not claim that Farmers policy directing employees to Liberty Mutual was ineffective. Rather, Willhite argues that because Farmers created a policy that instructs employees on the method by which they are to give notice of disability claims, Farmers cannot claim ignorance of notice reported pursuant to that policy. *Francacom v. Costco Wholesale Corp.,* 98 Wn.App. 845, 861 (2000). This is based upon the notion that by implementing a policy that requires an employee to reach out to a designated person or entity, "the employer itself answers the question of when it would be deemed to have notice. . . " *Breda v. Wolf Camera & Video*, 222 F.3d 886, 889-90 (2000)(notice to employer's designated contact for sexual harassment

claims was notice to employer). Were such not the case, an employer could designate a third party as the point person for the reporting of work place harassment in order to avoid liability for the wrongful conduct of its employees, under the guise of ignorance.

II. ERRORS IN JURY INSTRUCTIONS MANDATE REVERSAL OF VERDICT

A. INSTRUCTIONAL ERRORS WERE PRESERVED FOR APPEAL

Farmers claims that the instructional errors identified in Willhite's opening brief were not preserved for appeal. The record proves otherwise. As set forth in the opening brief, these errors were not only preserved, but the subject of extensive ongoing debate throughout the course of the trial. A review of the trial transcript reveals that at least nine hours were devoted to argument on jury instructions. Every single error identified in Willhite's appeal was the subject of extensive debate. Farmers' claim that Willhite "failed to object" is untrue, unsupported by the record and disingenuous.

CR 51(f) governs the procedure for objecting to, or the court's refusal to give, a jury instruction and provides:

> The objector shall state distinctly the matter to which he objects and the grounds of his objection, specifying the number, paragraph or particular part of the instruction to be given or refused and to which objection is made. CR 51(f)

The purpose of the rule is to ensure that that the trial court is apprised of the nature and substance of the objection and has an

opportunity to correct errors that would otherwise result in a new trial. *Washburn v. City of Federal Way*, 178 Wn.2d 732, 746-47 (2013); *Crossen v. Skagit County*, 100 Wn.2d 355, 358-59 (1983). Stated simply:

> So long as the trial court understands the reasons a party objects to a jury instruction, the party preserves its objection for review. *Washburn*, 178 Wn.2d at 747.

By the third day of trial, witness testimony had been interrupted so many times with argument on jury instructions that court determined that an entire day would be set aside for argument. RP (Dec. 10) 37:4-14. On Friday December 13, the parties spent the entire day in oral argument on jury instructions. The majority of the day was devoted to extensive debate on the notice language in final instruction 18, as the issue came up in virtually all contexts. A review of any one of these discussions reveals that Willhite offered and advocated for the pattern instruction, objected to the use of the notice language and articulated the reasoning in the case authority supporting his position. Willhite repeatedly urged the court to review the authority supporting his objections, which arises out of 40 years of US Supreme Court, Ninth Circuit and Washington State court precedent stating that discrimination cases are established by circumstantial evidence from which notice, intent and motive are inferred. In one excerpt:

> **COURT**: So are you agreeing to their No. 16?
>
> **KRIKORIAN**: I want to just go with the pattern. I don't know

why we are not – why we are even still – other than Ms. Daily thinks that it should be changed . . . RP (Dec. 13) 81: 13-17. . . .

COURT: My only question was, do you accept it? RP (Dec. 13) 81:25-1.

KRIKORIAN: ***No***, I would prefer the pattern. I think we just stick with the pattern. RP (Dec. 13) 82:2-3. . .
I just want to go with the pattern. I think it is the law. I mean, I think they don't want, enough said. 88:2-4. . . .
I just want to know what the – where is the law? Because to me, it seems like now the jury is saying, "Okay, we've got this substantial factor, okay. Now there is another one, now we have this thing about notice." So what does that mean? Is that like a certificate? Is it like something from a doctor? Obviously, in order to discriminate him, they have to notice that he has some behavior that's going to result in his termination, it goes without saying. So this makes it look like something more is required, and I'm sure that's why it is there. 97:8-19. . . . (Emphasis added)

I have just never seen this law. 101:1-2.

The case law outlines the factual circumstances from which discrimination can be inferred, as set forth in Willhite's proposed instructions 14, 15 and 16. As with the issue of notice, this law and the proposed instructions were debated throughout trial and on December 13. RP (Dec. 13) 56:18-109:25. Ironically, one of these discussions reveals the trial court's acknowledgement of the record for appeal:

THE COURT: ***I want you to make your record***. I don't want to cut you off, but I think it is consistent with my ruling on 15 that I also not give No. 16. I think they are very similar. RP (Dec. 13) 106:7-10. (Emphasis added)

No legitimate argument can be made that the court was not apprised of the nature and substance of Willhite's objection to the notice

instruction or the court's refusal to give Instructions 14, 15 and 16.

Despite the foregoing, Farmers claims that extensive argument is not enough, citing to *Queen City Farms, Inc., v. Centr. Nat'l Co*, 126 Wn.2d 50, 98 (1994); *Schmidt v. Cornerstone Invs. Inc.*, 115 Wn.2d 148, 162-63 (1990); and *Couch v. Mine Safety Appliances Co.*,107 Wn.2d 232, 245-46 (1986). None of these cases support such a proposition. In *Queen City,* the court held that the defendant failed to offer evidence necessary to prove its misrepresentation defense. Although preservation of instructional errors was not at issue, the Court did note that the defendant failed to object to the portion of the instruction mandating the evidence that the defense failed to offer. *Queen,* 126 Wn.2d at 98-99.

In *Schmidt*, the plaintiff claimed that the trial court erred by instructing the jury on contributory negligence. However, the plaintiff made no objection at trial, other than to say "no contributory negligence existed." *Schmidt*, 115 Wn.2d at 162-63. In *Couch*, the only "objection" raised to the instruction at issue was the defendant's offered alternative instruction. The defendant argued that the citation at the bottom of proposed instruction was sufficient to preserve the issue for appeal. The Court disagreed, stating that the citation was insufficient to inform the trial court of the point of law involved and the basis of the objection. *Couch*, 107 Wn.2d at 245. Nothing in *Queen City, Schmidt* or *Couch* suggests that the argument in the record here was insufficient to inform the court of

the nature and basis of Willhite's objections.

While Farmers readily concedes that there were "extended discussions" on jury instructions, it nonetheless argues that Willhite "waived" his right to appeal by not reiterating his objections after the court made its final ruling and presented the parties with its final instructions. There is no authority for such a proposition.[2] CR 51(g) governs the procedure after objections have been stated and provides:

> After counsel have completed their objections and the court has made any modifications deemed appropriate, the court shall then provide each counsel with a copy of the instructions in their final form. The court shall then read the instructions to the jury. CR 51(g).

The rule does not require, or arguably even permit, reiteration of objections previously advanced and overruled. The portion of record Farmers cites in support of the waiver argument is: 1) after extensive oral argument; 2) after the court made its final rulings on all instructions; and 3) after the court presented counsel with copies of the final instructions:

> **COURT**: All right. So folks, I already made the changes to the jury instructions, those have been printed off, e-mailed to everybody, but we'll bring you the hard copies because some folks may not have been able to get --. (Dec. 18) 91:4-9. . .
> So let's go through these for the final summary. You guys now have the final set . . . . (Dec. 18) 96:3-4.

At the time of this final summary, the court was fully apprised of Willhite's objections and the legal grounds therefore.

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2 To the contrary, objections made in pre-trial summary judgment proceedings that were not reiterated at trial have been held sufficient to preserve instructional errors for appeal. Queen City, 126 Wn.2d at 62 and 64.

B. THE JURY INSTRUCTIONS WERE CONTRARY TO LAW AND PREVENTED WILLHITE FROM ARGUING HIS THEORY OF THE CASE

1. *Instruction 18 Misstated The Law And Willhite's Burden Of Proof*

The elements of a disparate treatment claim are well established under Washington and federal law and are set forth in WPI 330.32. Farmers does not dispute that WPI 330.32 accurately reflects the law, as it currently exists. Rather, it argues that the law is wrong and, despite a legislative mandate for its liberal construction, claims that the instruction is too "plaintiff-friendly." It convinced the court and notice language was added to instruction 18. Farmers admits that it can cite no authority supporting this modification. RP (Dec. 13) 96:12-23. Moreover, the unpublished cases that Farmers offered in support of modification actually undermine Farmers' reasoning, as set forth in the appellant's brief. Because the jury was of the impression that it could not infer Farmers' notice and could not find constructive notice, the verdict must be vacated as it is predicated on an inaccurate recitation of the law. *Mackay,* 127 Wn.2d at 311.

Faced with reversal of the judgment, Farmers seeks to temper the gravity of the error by suggesting that the notice language in instruction 18 "merely indicated" what is a matter of "common sense." Farmers further argues that the notice language did not create a separate element of proof

and that Willhite was free to argue around it in any event. This argument is not supported by the law or the record. First, Willhite's right to have his theory presented in the instructions is not obviated by a claim that the error was simply a "nuance." *Svendgard v. State*, 122 Wn.App. 670, 677 (2004). Second, if the notice language was of so little consequence, one wonders why Farmers engaged in a vigorous and protracted debate to ensure its inclusion in the instructions. Third, whether the notice language is viewed as a separate element or as an affirmative defense is of no consequence. The fact remains that the jury was instructed that it could not find a substantial factor if it accepted Farmers' lack of notice argument. Farmers further suggest that a notice instruction is required given the plaintiff's burden to establish a discriminatory intent. This is a misreading of the case authority, which recognizes that there is rarely direct evidence of intent and that, in discrimination cases, intent is almost always established by inferences to be drawn from circumstantial evidence. *U.S. Postal Service Bd. Of Governors. v. Aikens*, 460 U.S. 711, 715-16 (1983)("the District Court erroneously thought that the respondent was required to submit direct evidence of discriminatory intent. . ."); *Hill v. BCTI, Income Fund-I*, 144 Wn.2d 172, 179(2001).

In essence, Farmers is asking this court to declare that an employer can claim ignorance of an employee's disability, despite knowledge that such employee has a serious health condition that resulted a three month

medical leave of absence. Willhite has yet to find a single case, in any jurisdiction, wherein such a fact scenario is presented. This is perhaps due to the fact that the leave of absence is itself notice of the disability, as medical leave is considered an accommodation. *Kimbro v. Atlantic Richfield Co.*, 889 F.2d 869, 879 (9th Cir.1989)(leave of absence as accommodation under WLAD); *Doe v. Boeing*, 121 Wn.2d 8, 21 fnt.5 (1993); *Humphrey v. Memorial Hospitals Ass'n*, 239 F.3d 1128, 1135 (9th Cir. 2001)(leave of absence as accommodation under ADA).[3]

But Farmers does not offer its ignorance defense with a good faith believe that there is a vacuum in the law. To the contrary, Farmers offered the same defense in *Owens v. Farmers* and this court unequivocally rejected it. And Farmers did not just raise it once. It brought the issue before this court after summary judgment was entered and again after trial. Notably, Farmers was advised in that opinion that notice of and employee's ***intention*** to seek medical leave is notice of the disability. *Owens v. Farmers Insurance Exchange*, 94 Wn.App. 1045 (1999), App. "R." Farmers continued assertion of an argument that has, in a prior action, been determined to be without merit. Remarkably, the duplicity does not end there. In its respondent's brief, Farmers objects to Willhite's

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3 Farmers not only denies knowledge of the disability, it does not concede that it had a duty to commence the accommodation process, even if Willhite had specifically requested one. On this point, counsel argued: "[I]f he had asked for an accommodation, that would have, perhaps, been a tip off to Farmers Life that he had a disability that needed accommodation." RP (Dec. 5) 131:10-13.

reference to *Owens* on the grounds that the case is unpublished. Willhite does not cite to *Owens* as case authority but, rather, as evidence that Farmers is knowingly advancing a defense that is contrary to law. At the same time, Farmers cites to nothing but two ***unpublished*** cases in support of the notice instruction that is at the heart of this appeal. App. "D," CP 1123. Farmers cites a single ***unpublished*** case in support of the order excluding the National Institute of Health depression publication. Farmers relies on two ***unpublished*** cases in support of the order limiting the testimony of Dr. Kihichak.

2. *The Refusal To Give Proposed Instructions 14, 15 and 16 Denied Willhite The Ability To Argue His Case*

Farmers argues that any errors in the failure to give proposed instructions 14, 15 and 16 were harmless, claiming that Willhite could have simply "argued" those theories to the jury. This argument is incomprehensible. First, Willhite is entitled to have the jury specifically instructed on the circumstances from which discrimination can be inferred. *Pannel v. Food Services of America*, 61 Wn.App. 418, 431-32 and 436 (1991). Second, the notice language in instruction 18 effectively eliminated the jury's ability to infer discrimination from any fact scenario. No argument, however skilled, could have been employed to convince the jury to arrive at a conclusion that the jury instructions forbade.

Farmers further argues that proposed instruction 16, regarding

inferences that can be drawn from an employer's post termination explanation, was based upon the burden shifting protocol in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973) and only applies to motions for summary judgment. This argument is untenable. First, the elements of a disparate treatment claim remain the same, whether assessed at summary judgment or at trial. *McDonnell* sets forth the burden of proof with respect to those elements, and specifically pretext, necessary to survive summary judgment. The elements themselves are as applicable at trial as on summary judgment and, in fact, *McDonnell* is regularly cited as authority in connection with a review of jury instructions. *Carle v. McChord Credit Union*, 65 Wn.App. 93 (1992); *Burnside v. Simpson* Paper, 123 Wn.2d 93 (1994); *Hume v. American Disposal*, 124 Wn.2d 656 (1994); *Dean v. Municipality of Metro Seattle*; 104 Wn.2d 627 (1985). The Supreme Court recently expanded the scope of pretext liability, holding that a jury can infer discrimination even if the employer's post-termination explanation is technically true, if it finds that discrimination was nonetheless a substantial motivating factor. *Scrivener v. Clark College,* __Wn.2d ___, 334 P.3d 541, 546 (2014). It further held that the plaintiff need not affirmatively disprove the employer's explanation in order for the jury to infer discrimination. *Id.*

Finally, Farmers further argues that Willhite failed to object to the special verdict form, as distinct from the jury instruction, and that he

waived his right to appeal as a result. There is no authority for this proposition as the law provides that objections to jury instructions serve to preserve for review the same issues as reflected in the special verdict form. *Queen City Farms,* 126 Wn.2d at 64.

III. ORDERS EXCLUDING WILLHITE'S EVIDENCE CONSTITUTE REVERSIBLE ERROR

A. ORDER EXCLUDING BECHTEL LETTER WAS ERROR

The Bechtel letter contains Farmers' post-termination explanation justifying its termination decision. Farmers argues that Willhite never offered the Bechtel letter at trial and therefore failed to preserve for appeal the issue of its admissibility. Willhite did not offer the letter as he was precluded from doing so by a court order *in limine*. Specifically, Willhite sought to offer the Bechtel letter as evidence of Farmer's lack of candor with the HRC, intending to argue to the jury that it could infer discrimination from Farmers' lack of candor. *Hill,* 144 Wn.2d at 184-85; *Sellsted v. Washington Mutual Savings Bank*, 69 Wn.App. 852, 861-64 (1993); *Riehl v. Foodmaker, Inc.,*152 Wn.2d 138, 151-53 (2004). Farmers moved in limine for an order precluding the letter from being offered ***for this very purpose.*** CP 860-62. Farmers' motion was granted, over opposition and objection. RP (Dec. 5) 54:12-20. At trial, Farmers fought vigorously (and successfully) for an order excluding all evidence of Bechtel's investigation into these "great lengths." RP (Dec. 5) 54:12-20.

B. Order Excluding Don Report Was Error

Farmers argues that without a finding of agency, the Don report was properly excluded as hearsay. However, because agency law does apply, the exclusion of the report was reversible error, as it contains the information subject to imputation.

Moreover, Farmers waived it ability to object on hearsay grounds when it failed to object to the report within 14 days of receiving Willhite's ER 904, wherein the report was listed as part of exhibit 18. CP 788. *Miller v. Arctic Alaska Fisheries Corp.*, 133 Wn.2d 250, 260 (1997). Even if Farmers had served a timely objection to Willhite's ER 904, the hearsay objection was waived nonetheless. This is because Farmers also listed the Don report in its ER 904 (as part of exhibit 3) and Willhite did not serve an objection. Once the 14 day objection period expired, the report was admissible and could be offered by either party. *Hendrickson v. King County*, 101 Wn.App. 258, 269 (2000). Finally, Farmers made repeated references at trial to Willhite being returned to work "without restriction" alluding to what was "missing" from the Liberty Mutual file that it claims to have never seen. All notions of fundamental justice and fair play rail against such a duplicitous and self-serving interpretation of the rules of evidence.

C. Order Limiting Kihichak Testimony Was Error

Farmers argues that the order limiting Dr. Kihichak's testimony

was "based upon well-reasoned authority." RB, p. 39. This authority consists of four out-of-state cases, two of which are unpublished. The only Washington authority cited by Farmers is *Smith v. Orthopedics International, Ltd.,* 170 Wn.2d 659 (2010). The holding in *Smith* supports Willhite's argument and stands for the proposition that a treating physician can testify to opinions derived from treatment on the grounds that the "unique position as a treating physician fact witness allows [a treating physician] more latitude to testify about his expertise than what other fact witnesses are permitted." *Smith,* 170 Wn.2d at 673.

Dr. Kihichak treated Willhite for depression. Based upon *Smith,* she should have been permitted to testify to whether Willhite's depression and anxiety affected the performance of the skills measured by the Matrix, such as "initiative" and "communication." The order precluding this testimony was rendered all the more prejudicial when Farmers argued that Willhite's job performance deficits were not related to his disability.

D. ORDER EXCLUDING NIH REPORT WAS ERROR

Reports of government studies are regularly admitted under ER 201(b)(2). Upon a showing that the accuracy of the source cannot be reasonably questioned, admission is mandatory. ER 201(d). *Pudmaroff v. Allen*, 138 Wn.2d 55, 65 n.5 (1999) (judicial notice taken of Washington Traffic Safety Commission Research Memorandum); *State v. Royal,* 122 Wn.2d 413, 418 (1993) (judicial notice taken of statistical data

generated by King County Clerk); *Evans v. Metropolitan Life Ins. Co.*, 26 Wn.2d 594, 633 (1946) (judicial notice taken of Washington State data on ten major causes of death). The only authority cited by Farmers in support of the order excluding the NIH report is an unpublished Illinois federal district court case. In its closing, Farmers argued that, while witnesses noted that Willhite had become withdrawn and less engaged, "that cannot be attributed to depression." RP (Dec. 18 Bowman) 139:5-8. The exclusion of the NIH publication was highly prejudicial as Willhite was unable to respond to this argument. *Cresap v. Pacific Inland Vav. Co.*, 78 Wn.2d 563, 567 (1970)(trial court's refusal to instruct jury on matter subject to judicial notice was reversible error as it deprived the plaintiff of his ability to argue his theory of the case).

E. ORDER EXCLUDING WILLHITE TESTIMONY ON DAMAGES WAS ERROR

Farmers has failed to cite a single Washington case that stands for the proposition that a plaintiff cannot testify to his own lost income and pension. This is because the law allows a plaintiff to testify to such matters, without expert designation, as the law presumes that a plaintiff has sufficient personal knowledge of his or her own income and property. *Kammerer v. Western Gear Corp.*, 27 Wn.App. 512, 526 (1980)(owner entitled to testify to value of patents); *McInnis & Co. v. Western Tractor & Equip.* Co., 67 Wn.2d 965, 968-69 (1966)(president of corporation can

testify to value of tractor); *McCurdy v. Union Pac R. Co*, 68 Wn.2d 457, 468 (1966)(owner entitled to testify to value of railroad car); *Ingersol v. Seattle-First Nat. Bank,* 63 Wn.2d 354, 358-59 (1963)(owner can testified to value of cattle and lost profits to dairy business); *Tiegs v. Watts*, 135 Wn.2d 1, 18 (1998)(potato farmer entitled testify to lost profits).

This is consistent with the rule that expert testimony is inappropriate and should be excluded on subjects that are within a jury's ability to comprehend without specialized training. *Salem v. U.S. Lines, Co.*, 370 U.S. 31, 35 (1962); *United States v. Finley*, 301 F.3d 1000, 1007 (9th Cir.2002) ("[T]he subject matter at issue must be beyond the common knowledge of the average layman."). Here, the calculations required to determine one's benefit under the Farmers' Pension Plan involves no more accounting skills than those required to balance a checkbook. To say that a jury could not understand the math necessary to multiply a few numbers is unfounded.

Farmers suggests that its inability to cite Washington authority in support of the exclusion is due to the 2004 amendment to ER 701, which was designed to bring the state rule in conformity with the federal rule. However, the federal law is consistent with Washington law and provides that a plaintiff in an employment discrimination case can testify to his or her lost future income. *Consolidated Maxfield v. Sinclair Intern.,* 766 F.2d 788 (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).

While Farmers cites *Donlin* for the proposition that Willhite's testimony was properly excluded, the case stands for the opposite proposition. The Third Circuit held that because the plaintiff was employed for such a short period and because she was not a vested pension beneficiary, she had insufficient personal knowledge to testify to future salary and pension projections. *Donlin*, 581 F.3d at 81-82. The court went on to state that its holding ***should not*** be interpreted to support an order excluding the testimony of a plaintiff with a long term employment history, stating that such history provides sufficient knowledge to testify to lost income and pension, citing to *Maxfield. Donlan*, 581 F.3d at 81.[4]

Farmers relies on the advisory notes to FRE 701 which are, however, consistent with the above rule and permit such testimony:

> [M]ost courts have permitted the owner or officer of a business to testify to the value or projected profits of the business, without the necessity of qualifying the witness as an accountant, appraiser, or similar expert. Such opinion testimony is admitted not because of experience, training or specialized knowledge within the realm of

4 The two other cases cited by Farmers in support of the exclusion are criminal matters involving issues unrelated to this case. *United States v. Peoples,* 250 F.3d 630 (8th Cir. 2001) involves the opinion testimony of an FBI agent regarding the subjective thoughts of two murder suspects at the time of a taped conversation. *United States v. Garcia,* 413 F.3d 201 (2nd Cir. 2005) concerns the testimony of a DEA agent who testified to a taped conversation between two drug dealers and offered an opinion on what the language used by the suspects revealed about their respective roles in the deal.

> an expert, but because of the particularized knowledge that the witness has by virtue of his or her position in the business. The amendment does not purport to change this analysis.
> FRE 701 Advisory Committee Notes on 2000 Amendments.

Willhite's testimony was based upon a 32 year salary, bonus and pension history. If not reversed, the order excluding this testimony will serve to deny Willhite the ability to recover significant damages stemming from Farmers' wrongful conduct.

IV. JUDGMENT SHOULD BE ENTERED IN FAVOR OF WILLHITE

Farmers does not dispute that this court has authority to enter judgment in favor of Willhite. Rather, Farmers argues that the records contains factual disputes regarding the nature and time frame of Willhite's disability, precluding judgment without a retrial. The record proves otherwise. First, the jury determined that Willhite had a disability. Farmers did not appeal this finding nor did it present any evidence undermining the significant medical evidence supporting not only the disability but the severity of Willhite's condition. Despite this, a significant portion of Farmers' responsive brief is devoted to a description of Willhite as a disgruntled employee, frustrated by a stalled career. It is unclear if this is offered to show that the depression diagnosis was an elaborate ruse or that Willhite's depression was caused by his frustration at work. In any event, both are irrelevant. The fact of the disability has been established. The law does not look to the cause of the disability

when assessing whether an employer engaged in discriminatory conduct. Depression that is caused or exacerbated by the work environment is subject to no fewer protections than is depression resulting from any other biological or situational cause. See *Martini v. Boeing*, 88 Wn.App. 442 (1997)(holding that depression resulting from hostile work environment is protected under WLAD).

Second, Farmers devotes much of its brief to a description of Willhite as a terrible employee with a protracted history of poor performance. While the performance deficits cited by Farmers are notably absent from Willhite's personnel file, the issue is irrelevant as Farmers admits that it terminated Willhite based ***solely*** on the Matrix score - which measured performance in the year prior to termination and the prior three performance reviews. Finally, it is undisputed that Willhite was suffering from depression for the entirety of the 12 month period during which his skills were assessed for the Matrix and at the time of his single negative performance on December 15, 2009. While Farmers claims that there is a dispute regarding the date marking the onset of Willhite's disability, the record proves otherwise. The only evidence admitted at trial regarding the date on when Willhite began suffering from depression is in Dr. Kihichak's medical records. Admitted as part of exhibit 18, those records reveal that Willhite began experiencing symptoms of depression in November 2008. App. "C," p. LM 48.

Hoping to avoid those records, Farmers moved the court, in limine, for an order establishing that Willhite's disability commenced on the first day of his medical leave, as though the condition popped into existence on the date that it was deemed severe enough to warrant a medical leave of absence. In support of the argument, Farmers cited to Willhite's pre-trial deposition where he was asked: "During what period of time were you disabled? " After objection was stated, Willhite responded: "From the time of leave." CP 862. Farmers' motion was denied. RP (Dec. 5) 56:9-61:16. Farmers offered no evidence at trial regarding the date on which Willhite's disability commenced.

With these facts established as undisputed, there is no need for a retrial on the issue of liability. As such, if this court finds that agency law applies, it should order that judgment be entered in favor of Willhite and remand for trial on the issue of damages.

V. WILLHITE IS ENTITLED TO FEES AND COSTS

Farmers offers no opposition to Willhite's request for fees and costs. As such, should this court vacate the underlying judgment and order judgment entered in favor of Willhite, Willhite is entitled to recover all fees and costs incurred to date, through appeal, pursuant to RCW 49.60.030(2) and RAP 18.1.

VI. CONCLUSION

By carving out notice as a separate element, by refusing to instruct the jury that it could infer discrimination from the circumstances, by permitting Farmers to assert the plausible deniability defense and by excluding all evidence from which discrimination could be inferred, the trial court gave life into the very evidentiary dynamic that laws against discrimination seeks to eliminate – the employer's ability to gather all incriminating evidence in a vault while telling the employee who complains of discrimination: "I'd like to see you prove it."

Willhite respectfully requests that this court grant the relief set forth in his appellant's brief.

Dated: September 4, 2014

CREER LEGAL
LAW OFFICES OF BRIAN H. KRIKORIAN

By: ERICA A. KRIKORIAN, WSBA#28793
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I, Brian H. Krikorian, declare:

On December 5, 2014, I caused to be serve the following documents:

1. Appellant's Reply Brief

on : Jill D. Bowman
STOEL RIVES LLP
600 University Street, Suite 3600
Seattle, WA 98101-4109

☐ by ABC Legal Messenger
☐ United States First Class Mail
☐ E-service as allowed by the King County Superior Court Local Rules
☒ Email service (per existing agreement)
☐ Facsimile Service

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated: December 5, 2014

By /s Brian H. Krikorian
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Appendices

AA - Restatement (Third) of Agency § 1.01 (2006)

BB - Restatement (Second) of Agency §14 (1958)

CC - Restatement (Second) of Agency §1 (1958)

DD - Restatement (Third) of Agency § 7.06 (2006).

EE - *Derocher v. Crescent Wharf & Warehouse*, BRB 83-2484 (1985)

FF - *Steed v. Container*, 25 BRBS 210 (1991)

GG - *Bustillo v. Southwest*, 33 BRBS 15 (1999)

Appendix AA

Restatement (Third) Of Agency § 1.01 (2006)

Restatement of the Law - Agency

Database updated March 2014
Restatement (Third) of Agency

Chapter 1. Introductory Matters

Topic 1. Definitions and Terminology

§ 1.01 Agency Defined

Agency is the fiduciary relationship that arises when one person (a "principal") manifests assent to another person (an "agent") that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act.

Comment:

a. Scope and cross-references. Comment *b* discusses various usages of agency terminology. Comment *c* is a general discussion of the defining elements of agency. Comment *d* discusses how a relationship of agency is formed. It is not necessary that the agent manifest assent to the principal. See Comment *c* and § 3.01, comment *b*. Comments *e-h* discuss the elements of agency in more detail. Section 1.02 states the principle that it is a legal conclusion whether a particular relationship is one of agency. Section 1.03 defines manifestation. Section 1.04 defines and distinguishes among some common types of agents and principals.

b. Usage. This definition states the elements of the relationship widely referred to as "common-law agency" or "true agency." The definition excludes cognate relationships in which, although the legal consequences of one person's actions are attributed to another person, one or more of the defining elements of agency are not present. See §§ 3.12- 3.13, dealing with powers given as security and irrevocable proxies, and § 8.09, Comment *d*, discussing the duties of an escrow holder. Nonetheless, such cognate relationships are often grouped with relationships of common-law agency. More generally, legal usage varies. Some statutes and many cases use agency terminology when the underlying relationship falls outside the common-law definition.

Moreover, the terminology of agency is widely used in commercial settings and academic literature to characterize relationships that are not necessarily encompassed by the legal definition of agency. In philosophical and literary studies, "agency" often means an actor's capacity to assert control over the actor's own intentions, desires, and decisions. In economics, definitions of principal-agent relations encompass relationships in which one person's effort will benefit another or in which collaborative effort is required. In commercial settings, the term "principal" is often used to designate one who benefits from or is affected by the acts of another, or one who sponsors or controls another. It is also common usage to refer without distinction to parties who serve any intermediary function as "agents." Not all such situations, however, meet the legal definition of an agency relationship. Moreover, the legal consequences of agency may attach to only a portion of the relationship between two persons, a fact that dictates care in using the term "agency relationship." Aspects of an overall relationship may constitute agency and entail its legal consequences while other aspects do not. It is also possible for the same person to be a principal as well as an agent in an interaction with a third party. The Introduction states the coverage of this Restatement.

c. Elements of agency. As defined by the common law, the concept of agency posits a consensual relationship in which one person, to one degree or another or respect or another, acts as a representative of or otherwise acts on behalf of another person with power to affect the legal rights and duties of the other person. The person represented has a right to control the actions of the agent. Agency thus entails inward-looking consequences, operative as between the agent and the principal, as well as outward-looking consequences, operative as among the agent, the principal, and third parties with whom the agent interacts. Only interactions that are within the scope of an agency relationship affect the principal's legal position. In some situations, the consequences of agency are imposed without a person's consent, such as when a court appoints a lawyer for a person appearing before the court, or when a statute designates an agent for purposes of service of process. See Comment *d* for further discussion of consent.

The common-law definition requires that an agent hold power, a concept that encompasses authority but is broader in scope and connotation. The terminology of "power" is neutral in that it states a result but not the justification for the result. An agent who has actual authority holds power as a result of a voluntary conferral by the principal and is privileged, in relation to the principal, to exercise that power. Actual authority is defined in § 2.01. Actual authority does not exhaust the circumstances under which the legal consequences of one person's actions may be attributed to another person. An agent also has power to affect the principal's legal relations through the operation of apparent authority, as stated in § 2.03. Additionally, a person may be estopped to deny the existence of an agency relationship, as stated in § 2.05. Separately, a person may, through ratification, create the consequences of actual authority with respect to an actor's prior act. See Chapter 4.

Agency encompasses a wide and diverse range of relationships and circumstances. The elements of common-law agency are present in the relationships between employer and employee, corporation and officer, client and lawyer, and partnership and general partner. People often retain agents to perform specific services. Common real-estate transactions, for example, involve the use of agents by buyers, sellers, lessors, and lessees. Authors, performers, and athletes often retain specialized agents to represent their interests in dealing with third parties. Some industries make frequent use of nonemployee agents to communicate with customers and enter into contracts that bind the customer and a vendor. Agents who lack authority to bind their principals to contracts nevertheless often have authority to negotiate or to transmit or receive information on their behalf. Some common forms of agency have a personal and noncommercial flavor, exemplified by the relationship created by a power of attorney that confers authority to make decisions regarding an individual's health care, place of residence, or other personal matters. See Comment *d*. On durable powers of attorney, see § 3.08(2).

Not all relationships in which one person provides services to another satisfy the definition of agency. It has been said that a relationship of agency always "contemplates three parties—the principal, the agent, and the third party with whom the agent is to deal." 1 Floyd R. Mechem, A Treatise on the Law of Agency § 27 (2d ed. 1914). It is important to define the concept of "dealing" broadly rather than narrowly. For example, a principal might employ an agent who acquires information from third parties on the principal's behalf but does not "deal" in the sense of entering into transactions on the principal's account. In contrast, if a service provider simply furnishes advice and does not interact with third parties as the representative of the recipient of the advice, the service provider is not acting as an agent. The adviser may be subject to a fiduciary duty of loyalty even when the adviser is not acting as an agent. The common law of agency, however, additionally encompasses the employment relation, even as to employees whom an employer has not designated to contract on its behalf or otherwise to interact with parties external to the employer's organization. In contrast, the common term "independent contractor" is equivocal in meaning and confusing in usage because some termed independent contractors are agents while others are nonagent service providers. The antonym of "independent contractor" is also equivocal because one who is not an independent contractor may be an employee or a nonagent service provider. This Restatement does not use the term "independent contractor," except in discussing other material that uses the term. Section 7.07(3) states the criteria that classify a person as an employee, as opposed to a nonagent service provider, for purposes of an employer's vicarious liability for torts committed within the scope of employment.

Despite their agency relationship, a principal and an agent retain separate legal personalities. Agency does not merge a principal's personality into that of the agent, nor is an agent, as an autonomous person or organization with distinct legal personality, merged into the principal. The fact that an agent acts on behalf of, or represents, another person implies the existence of limits on the scope of the agency relationship and on the extent to which the principal is accountable for the agent's acts. The metaphor of identification, which merges an agent's distinct identity with the principal's, is potentially misleading and not helpful as a starting point for analysis.

A relationship is not one of agency within the common-law definition unless the agent consents to act on behalf of the principal, and the principal has the right throughout the duration of the relationship to control the agent's acts. A principal's manifestation may be such that an agency relationship will exist without any communication from the agent to the principal

explicitly stating the agent's consent. If the principal requests another to act on the principal's behalf, indicating that the action should be taken without further communication and the other consents so to act, an agency relationship exists. If the putative agent does the requested act, it is appropriate to infer that the action was taken as agent for the person who requested the action unless the putative agent manifests an intention to the contrary or the circumstances so indicate.

A principal's right to control the agent is a constant across relationships of agency, but the content or specific meaning of the right varies. Thus, a person may be an agent although the principal lacks the right to control the full range of the agent's activities, how the agent uses time, or the agent's exercise of professional judgment. A principal's failure to exercise the right of control does not eliminate it, nor is it eliminated by physical distance between the agent and principal. For further discussion of control, see Comment *f*. The common-law definition of agency presupposes a principal who exists and who has legal capacity throughout the duration of the relationship; otherwise the principal will not be able on an ongoing basis to assess the agent's performance in relationship to the principal's interests. See § 3.04. The requirement that an agent be subject to the principal's control assumes that the principal is capable of providing instructions to the agent and of terminating the agent's authority. Comments *d* and *f* discuss, inter alia, the tension between these elements of the common-law definition and durable powers of attorney. The chief justifications for the principal's accountability for the agent's acts are the principal's ability to select and control the agent and to terminate the agency relationship, together with the fact that the agent has agreed expressly or implicitly to act on the principal's behalf.

d. Creation of agency. Under the common-law definition, agency is a consensual relationship. The definition requires that an agent-to-be and a principal-to-be consent to their association with each other. In contrast to the formulation in Restatement Second, Agency § 1, the definition in this section refers to a principal's manifestation of "assent," not "consent." The different terminology is intended to emphasize that unexpressed reservations or limitations harbored by the principal do not restrict the principal's expression of consent to the agent. See Restatement Second, Contracts § 17, Comment *c*. If an agent is otherwise on notice of the meaning the principal ascribes to a particular expression, that meaning is operative as between principal and agent. See § 1.03, Comment *e*. A principal's manifestation of assent to an agency relationship may be informal, implicit, and nonspecific. See § 1.03, which defines manifestation.

As to the agent, a relationship of agency as defined in this section requires that the agent "manifests assent or otherwise consents so to act," in contrast to the requirement in Restatement Second, Agency § 1 that the agent "consent." The formulation in this section, consistent with Restatement Second, recognizes that it is not necessary to the formation of a relationship of agency that the agent manifest assent to the principal, as when the agent performs the service requested by the principal following the principal's manifestation, or when the agent agrees to perform the service but does not so inform the principal and does not perform. It is a question of fact whether the agent has agreed.

Additionally, the consensual aspect of agency does not mean that an enforceable contract underlies or accompanies each relation of agency. Many agents act or promise to act gratuitously. While either acting as an agent or promising to do so creates an agency relation, neither the promise to act gratuitously nor an act in response to the principal's request for gratuitous service creates an enforceable contract. See Restatement Second, Contracts § 71.

In some instances, however, relationships that are less than fully consensual and, therefore, not common-law agency relations trigger legal consequences equivalent to those of agency. A notable instance is a durable power of attorney. The basic presupposition that agency is a consensual relationship that vests in the principal the right of interim control over the agent is at odds with the relationship between principal and agent created by a durable power of attorney, a relationship in which the agent's power survives or is triggered by the principal's loss of mental competence. Once the principal becomes unable to terminate the relationship or to provide instructions to the agent, the principal's relationship with the agent is no longer the relationship presupposed by the common law of agency, even though in creating the power the principal consented initially to the mechanism that led to the later and less consensual relationship with the agent. Although no res exists, the relationship then resembles a trust. Durable powers are treated in § 3.08(2) and in Restatement Third, Property (Wills and Other Donative Transfers) § 8.1, Comment *l*.

Many of the legal consequences of agency also apply in situations that resemble agency in form but in which the parties' consent is subject to constraints imposed by law or by legal or regulatory institutions. As a consequence of such constraints, the decision to appoint a particular agent or to continue the agency relation is not within the parties' exclusive control. For example, the law implies a principal-agency relationship between the owner of a lost item and government officials who recover it. Additionally, court-appointed counsel represents the client, notwithstanding the client's objection, and counsel's withdrawal from representation in litigation requires the court's assent. All attorneys are subject to ethical responsibilities that constrain the authority of their clients as principals.

Likewise, the legal consequences resemble those of common-law agency when an "agent's" powers are specified by operation of law, not by the parties. A statutory designation of the Secretary of State as agent to receive service of process is not a consensual choice of agent on the part of the principal or specification of the agent's powers but follows a choice to carry on activity in a particular state. In maritime law, under the 1989 International Convention on Salvage, a ship's master has authority to contract for salvage operations on behalf of the vessel's owner, and the master and the owner have authority to conclude such contracts on behalf of the owner of property on board the vessel. Additionally, the law may mandate that an agent be used to perform a particular function, such as the federal statutory requirement that stock in an employee ownership plan be held and voted by trustees.

e. Fiduciary character of relationship. The scope of an agency relationship defines the scope of an agent's duties to a principal and a principal's duties to an agent. If the relationship between two persons is one of agency as defined in this section, the agent owes a fiduciary obligation to the principal. The word "fiduciary" appears in the black-letter definition to characterize or classify the type of legal relationship that results if the elements of the definition are present and to emphasize that an agency relationship creates the agent's fiduciary obligation as a matter of law.

As a general matter, the term "fiduciary" signifies that an agent must act loyally in the principal's interest as well as on the principal's behalf. See Comment *g* for a discussion of "acting on behalf of." See § 8.01 for an agent's basic duty of loyal action. Any agent has power over the principal's interests to a greater or lesser degree. This determines the scope in which fiduciary duty operates. An agent has such power even when the principal holds a superior economic position or possesses greater expertise or acumen.

To establish that a relationship is one of agency, it is not necessary to prove its fiduciary character as an element. The obligations that a principal owes an agent, specified in §§ 8.13- 8.15, are not fiduciary. In addition to an agent's fiduciary duties, the agent has a duty to fulfill specific contractual undertakings that the agent has made to the principal and to third parties, as well as to fulfill any duties imposed on the agent by law. Correlatively, a principal can owe duties created by contractual undertakings to the agent. Chapter 8 states the specific duties owed by the agent and the principal. Section 8.06 governs consent by the principal to conduct that would otherwise breach the agent's duties of loyalty.

Fiduciary duty does not necessarily extend to all elements of an agency relationship, and does not explain all of the legal consequences that stem from the relationship. Fiduciary duty does not operate in a monolithic fashion. Most questions concerning agents' fiduciary duty involve the agent's relationship to property owned by the principal or confidential information concerning the principal, the agent's undisclosed relationship to third parties who compete with or deal with the principal, or the agent's own undisclosed interest in transactions with the principal or competitive activity. It is open to question whether an agent's unconflicted exercise of discretion as to how to best carry out the agent's undertaking implicates fiduciary doctrines.

Three types of consequences result from an agent's fiduciary duties to the principal. First, if an agent breaches a fiduciary duty of loyalty, distinctive remedies are available to the principal. Moreover, burdens of proof are often allocated differently in cases alleging breach of fiduciary obligation than in civil litigation generally. A different limitation period may apply, and it may not begin to run until the principal discovers the breach of duty. These points are elaborated in §§ 8.01- 8.06.

Second, the content of an agent's duties to the principal is distinctive. Unless the principal consents as stated in § 8.06, an agent may not use the principal's property, the agent's position, or nonpublic information the agent acquires while acting within the scope of the relationship, for the agent's own purposes or for the benefit of another. Similarly, unless the principal consents as stated in § 8.06, an agent may not bind the principal to transactions in which the agent deals with the principal on the agent's own account without disclosing the agent's interest to the principal. Without the principal's consent, an agent may not compete with the principal as to the subject matter of the agency, nor may the agent act on behalf of one with interests adverse to those of the principal in matters in which the agent is employed. See §§ 8.01- 8.06 for a detailed treatment of these duties.

Third, the fiduciary character of an agent's position, on the one hand, and the principal's right to control the agent, on the other hand, are linked in a manner that differentiates both (a) the function of an agent-fiduciary from that of a nonagent-fiduciary and (b) agency relationships from nonagency relationships that are defined and controlled solely by contract. An agent's fiduciary position requires the agent to interpret the principal's statement of authority, as well as any interim instructions received from the principal, in a reasonable manner to further purposes of the principal that the agent knows or should know, in light of facts that the agent knows or should know at the time of acting. An agent thus is not free to exploit gaps or arguable ambiguities in the principal's instructions to further the agent's self-interest, or the interest of another, when the agent's interpretation does not serve the principal's purposes or interests known to the agent. This rule for interpretation

by agents facilitates and simplifies principals' exercise of the right of control because a principal, in granting authority or issuing instructions to an agent, does not bear the risk that the agent will exploit gaps or ambiguities in the principal's instructions. In the absence of the fiduciary benchmark, the principal would have a greater need to define authority and give interim instructions in more elaborate and specific form to anticipate and eliminate contingencies that an agent might otherwise exploit in a self-interested fashion. That is, the principal would be at greater risk in granting authority and stating instructions in a form that gives an agent discretion in determining how to fulfill the principal's direction. For organizational principals, this rule simplifies the process through which directions are communicated, understood, and executed within an organization. Accordingly, instructions need not be drafted with the detail and specificity that typify the instruments embodying the terms of many arm's-length commercial and financial relationships.

Illustrations:
Illustrations:

1. P Corporation manufactures tobacco products, including two brands of cigarettes. Brand C has the largest sales in North America. Brand D has fewer sales in North America but exceeds Brand C in worldwide sales, chiefly in less-developed countries. A is employed by P Corporation as the general manager of its cigarette division. A reports to P Corporation's Executive Vice President. A forms the beliefs that cigarette smoking is injurious to health and that it is socially desirable that fewer rather than more people smoke cigarettes. A does not disclose these beliefs to P Corporation. The Executive Vice President, intending to refer to Brand D, instructs A as follows: "Redirect all expenditures on advertising to the best-selling brand." A believes that it is socially undesirable to export cigarette consumption in the face of a declining domestic market. A enters into an advertising contract with T Corporation, in which T Corporation will advertise Brand C exclusively.A has breached the fiduciary duty A owes to P Corporation. Although the Executive Vice President's direction to A did not precisely specify how to determine the identity of "the best-selling brand," A's interpretation of the instruction was contrary to P Corporation's interests as A should reasonably have understood them. P Corporation is a party to the contract A made with T Corporation if T Corporation reasonably believed A had authority to make the contract. See § 2.03, which defines apparent authority. A lacked actual authority to make the contract because A could not reasonably believe P Corporation wished A to do so. See §§ 2.01- 2.02, which define actual authority and its scope.
2. P, an operatic tenor, employs A as a business manager with authority to book P's performances. P directs A to book P to perform a concert in a particular concert hall owned by T. A knows that the acoustic quality of T's concert hall has recently deteriorated in quality due to an error made in remodeling. Neither the error nor the deterioration is public knowledge, and A has no reason to believe P knows of it. A books P to perform in T's concert hall without telling P about the acoustic deterioration because A hopes to obtain employment with T. A has breached A's fiduciary duty to P, even though A carried out P's literal instructions.

f. Principal's power and right of interim control.

(1). Principal's power and right of interim control—in general. An essential element of agency is the principal's right to control the agent's actions. Control is a concept that embraces a wide spectrum of meanings, but within any relationship of agency the principal initially states what the agent shall and shall not do, in specific or general terms. Additionally, a principal has the right to give interim instructions or directions to the agent once their relationship is established. Within an organization the right to control its agents is essential to the organization's ability to function, regardless of its size, structure, or degree of hierarchy or complexity. In an organization, it is often another agent, one holding a supervisory position, who gives the directions. For definitions of the terms "superior" and "subordinate" coagents, see § 1.04(9). A principal may exercise influence over an agent's actions in other ways as well. Incentive structures that reward the agent for achieving results affect the agent's actions. In an organization, assigning a specified function with a functionally descriptive title to a person tends to control activity because it manifests what types of activity are approved by the principal to all who know of the function and title, including their holder.

A relationship of agency is not present unless the person on whose behalf action is taken has the right to control the actor. Thus, if a person is appointed by a court to act as a receiver, the receiver is not the agent of the person whose affairs the receiver manages because the appointing court retains the power to control the receiver.

A principal's control over an agent will as a practical matter be incomplete because no agent is an automaton who mindlessly but perfectly executes commands. A principal's power to give instructions, created by the agency relationship, does not mean that all instructions the principal gives are proper. An agent's duty of obedience does not require the agent to obey instructions to commit a crime or a tort or to violate established professional standards. See § 8.09(2). Moreover, an agent's duty of obedience does not supersede the agent's power to resign and terminate the agency relationship. See § 3.10.

The power to give interim instructions distinguishes principals in agency relationships from those who contract to receive services provided by persons who are not agents. In many agreements to provide services, the agreement between the service provider and the recipient specifies terms and conditions creating contractual obligations that, if enforceable, prescribe or delimit the choices that the service provider has the right to make. In particular, if the service provider breaches a contractual obligation, the service recipient has a claim for breach of contract. The service provider may be constrained by both the existence of such an obligation and the prospect of remedies for breach of contract. The fact that such an agreement imposes constraints on the service provider does not mean that the service recipient has an interim right to give instructions to the provider. Thus, setting standards in an agreement for acceptable service quality does not of itself create a right of control. Additionally, if a service provider is retained to give an independent assessment, the expectation of independence is in tension with a right of control in the service recipient.

To the extent the parties have created a relationship of agency, however, the principal has a power of control even if the principal has previously agreed with the agent that the principal will not give interim instructions to the agent or will not otherwise interfere in the agent's exercise of discretion. However, a principal who has made such an agreement but then subsequently exercises its power of control may breach contractual duties owed to the agent, and the agent may have remedies available for the breach.

Illustrations:
Illustrations:

3. P arranges with A for A to buy large quantities of coffee beans on P's behalf. The compensation agreed to is predicated on P's assurance that A will not need to travel abroad to make the purchases. Later P directs A to fly to Colombia to buy coffee beans. A has a choice. A may resign as P's agent. If A does not resign, A must obey the instruction but may have a claim against P for the increased cost of A's performance. A may waive the claim if A fails to remind P of P's assurance before departing for Colombia if it is reasonable to do so, for example if it appears that P has forgotten the assurance.
4. P owns a professional baseball team. Needing a new general manager, P negotiates an agreement with A, a manager. A insists that P provide an assurance in A's employment agreement that A will have autonomy in running the team. P agrees. Before the start of the season, P directs A to schedule no night games on weeknights during the school term. It is feasible for A to comply with P's directive. A must obey the instruction. Alternatively, A may resign. If A resigns, A has a contract claim against P. If A does not resign, A may have a contract claim against P, but A's ability to recover on the claim would depend, inter alia, on A's ability to show damage.

If an agent disregards or contravenes an instruction, the doctrine of actual authority, defined in § 2.01, governs the consequences as between the principal and the agent. Section 8.09 states an agent's duties to act only within the scope of actual authority and to comply with lawful instructions. The rights and obligations of the third party with whom the agent interacts are governed by the doctrines of actual authority and apparent authority. Doctrines of estoppel, restitution, and ratification are also relevant under some circumstances. See §§ 2.03, 2.05- 2.07, and 4.01- 4.08.

Illustrations:
Illustrations:

5. Same facts as Illustration 4. After A learns of P's directive, A enters into a scheduling agreement with another team, owned by Q, under which P's team will play night games during the school term. Q has no notice of P's directive to A. Although A lacks actual authority to bind P to the agreement, the agreement may bind P and Q if A acted with apparent authority.
6. Same facts as Illustration 5, except that Q has notice of P's instructions to A. Unless P ratifies A's conduct, neither P nor Q is bound by the agreement because A has neither actual nor apparent authority to bind P. Section 4.01(2) states the circumstances under which ratification occurs.

The principal's right of control in an agency relationship is a narrower and more sharply defined concept than domination or influence more generally. Many positions and relationships give one person the ability to dominate or influence other persons but not the right to control their actions. Family ties, friendship, perceived expertise, and religious beliefs are often the source of influence or dominance, as are the variety of circumstances that create a strong position in bargaining. A position of dominance or influence does not in itself mean that a person is a principal in a relationship of agency with the person over whom dominance or influence may be exercised. A relationship is one of agency only if the person susceptible to dominance or influence has consented to act on behalf of the other and the other has a right of control, not simply an ability to bring influence to bear.

The right to veto another's decisions does not by itself create the right to give affirmative directives that action be taken,

which is integral to the right of control within common-law agency. Thus, a debtor does not become a creditor's agent when a loan agreement gives the creditor veto rights over decisions the debtor may make. Moreover, typically a debtor does not consent to act on behalf of the creditor as opposed to acting in its own interests.

The principal's right of control presupposes that the principal retains the capacity throughout the relationship to assess the agent's performance, provide instructions to the agent, and terminate the agency relationship by revoking the agent's authority. See § 3.10 on the principal's power to revoke authority. Under the common law of agency, as stated in Restatement Second, Agency § 122(1), a durable agency power, one that survives the principal's loss of mental competence, was not feasible because of the loss of control by the principal. Section 3.08(2), like statutes in all states, recognizes the efficacy of durable powers, which enable an agent to act on behalf of a principal incapable of exercising control. Legitimating the power does not eliminate the risks for the principal that are inherent when the agent is not subject to direction or termination by the principal.

(2). Principal's power and right of interim control—corporate context. Many questions testing the nature of the right of control arise as a result of the legal consequences of incorporating or creating a juridical or legal person distinct from its shareholders, its governing body, and its agents. A corporation's agents are its own because it is a distinct legal person; they are not the agents of other affiliated corporations unless, separately, an agency relation has been created between the agents and the affiliated corporation. Similarly, the hierarchical link between a local union and its international affiliate does not by itself create a relationship of agency between the local and the international.

Although a corporation's shareholders elect its directors and may have the right to remove directors once elected, the directors are neither the shareholders' nor the corporation's agents as defined in this section, given the treatment of directors within contemporary corporation law in the United States. Directors' powers originate as the legal consequence of their election and are not conferred or delegated by shareholders. Although corporation statutes require shareholder approval for specific fundamental transactions, corporation law generally invests managerial authority over corporate affairs in a board of directors, not in shareholders, providing that management shall occur by or under the board of directors. Thus, shareholders ordinarily do not have a right to control directors by giving binding instructions to them. If the statute under which a corporation has been incorporated so permits, shareholders may be allocated power to give binding instructions to directors through a provision in the corporation's articles or through a validly adopted shareholder agreement. The fact that a corporation statute may refer to directors as the corporation's "agents" for a particular purpose does not place directors in an agency relationship with shareholders for purposes of the common law of agency. In any event, directors' ability to bind the corporation is invested in the directors as a board, not in individual directors acting unilaterally. A director may, of course, also be an employee or officer (who may or may not be an employee) of the corporation, giving the director an additional and separate conventional position or role as an agent. Fellow directors may, with that director's consent, appoint a director as an agent to act on behalf of the corporation in some respect or matter.

Illustrations:
Illustrations:

7. A is an employee of S Corporation. P Corporation owns all the stock of S Corporation. A is not an agent of P Corporation because P Corporation's only relationship with A is that P Corporation is the sole shareholder of A's employer.
8. Same facts as Illustration 7, except that S Corporation and P Corporation are incorporated in a jurisdiction that permits a corporation to provide in its articles of incorporation that the powers of the corporation's directors shall be exercised subject to written instructions given by the corporation's shareholders in a resolution adopted by a majority of the shareholders. S Corporation's articles contain such a provision. A is not an agent of P Corporation.
9. Same facts as Illustration 7, except that A and P Corporation agree that, in performing A's duties as an employee of S Corporation, A shall act as P Corporation directs in the interest of P Corporation. A consents so to act. A is an agent of P Corporation as well as of S Corporation.

g. Acting on behalf of. The common-law definition of agency requires as an essential element that the agent consent to act on the principal's behalf, as well as subject to the principal's control. From the standpoint of the principal, this is the purpose for creating the relationship. The common law of agency encompasses employment as well as nonemployment relations. Employee and nonemployee agents who represent their principal in transactions with third parties act on the principal's account and behalf. Employee-agents whose work does not involve transactional interactions with third parties also act "on behalf of" their employer-principal. By consenting to act on behalf of the principal, an agent who is an employee consents to do the work that the employer directs and to do it subject to the employer's instructions. In either case, actions "on behalf of" a principal do not necessarily entail that the principal will benefit as a result.

In any relationship created by contract, the parties contemplate a benefit to be realized through the other party's performance. Performing a duty created by contract may well benefit the other party but the performance is that of an agent only if the elements of agency are present. A purchaser is not "acting on behalf of" a supplier in a distribution relationship in which goods are purchased from the supplier for resale. A purchaser who resells goods supplied by another is acting as a principal, not an agent. However, courts may treat a trademark licensee as the agent of the licensor in certain situations, with the result that the licensor is liable to third parties for defective goods produced by licensees.

Illustrations:
Illustrations:

10. P Corporation designs and sells athletic footwear using a registered trade name and a registered trademark prominently displayed on each item. P Corporation licenses A Corporation to manufacture and sell footwear bearing P Corporation's trade name and trademark, in exchange for A Corporation's promise to pay royalties. Under the license agreement, P Corporation reserves the right to control the quality of the footwear manufactured under the license. A Corporation enters into a contract with T to purchase rubber. As to the contract with T, A Corporation is not acting as P Corporation's agent, nor is P Corporation the agent of A Corporation by virtue of any obligation it may have to defend and protect its trade name and trademark. P Corporation's right to control the quality of footwear manufactured by A Corporation does not make A Corporation the agent of P Corporation as to the contract with T.
11. Same facts as Illustration 10, except that P Corporation and A Corporation agree that A Corporation will negotiate and enter into contracts between P Corporation and retail stores for the sale of footwear manufactured by P Corporation. A Corporation is acting as P Corporation's agent in connection with the contracts.
12. P Corporation, a financial-services firm, licenses A Corporation, a supermarket chain, to sell P Corporation's money-transfer service through A Corporation's supermarkets. P Corporation's agreement with A Corporation requires A to handle transactions in accord with P's operating procedures and to maintain records accessible by P. To use the service, a customer remits cash at an A Corporation supermarket. The intended recipient of the cash, upon presentation of appropriate identification, may collect it at another A Corporation supermarket or other outlet licensed by P Corporation. Once an A Corporation supermarket accepts cash from a customer, P is bound to wire cash in that amount to the outlet specified by the customer. A Corporation is P Corporation's agent in activities connected with the money-transfer service.
13. P owns a shopping mall. A rents a retail store in the mall under a lease in which A promises to pay P a percentage of A's monthly gross sales revenue as rent. The lease gives P the right to approve or disapprove A's operational plans for the store. A is not P's agent in operating the store.
14. Same facts as Illustration 13, except that A additionally agrees to collect the rent from the mall's other tenants and remit it to P in exchange for a monthly service fee. A is P's agent in collecting and remitting the other tenants' rental payments. A is not P's agent in operating A's store in the mall.

An actor who acts under the immediate control of another person is not that person's agent unless the actor has agreed to act on the person's behalf. For example, a foreman or supervisor in charge of a crew of laborers exercises full and detailed control over the laborers' work activities. The relationship between the foreman and the laborers is not an agency relationship despite the foreman's full control, nor is their relationship one of subagency. Section 1.04(8) defines subagency. The foreman and the laborers are coagents of a common employer who occupy different strata within an organizational hierarchy. See § 1.04(9), which defines "superior" and "subordinate" coagents. The foreman's role of direction, defined by the organization, does not make the laborers the foreman's own agents. The laborers act on behalf of their common employer, not the foreman. Likewise, the captain of a ship and its crew are coagents, hierarchically stratified, who have consented to act on behalf of their common principal, the ship's owner.

It is possible to create a power to affect a person's legal relations to be exercised for the benefit of the holder of the power. Such powers typically are created as security for the interests of the holder or otherwise to benefit a person other than the person who creates the power. Consequently, the holder of such a power is not an agent as defined in this section, even though the power has the form of agency and, if exercised, will result in some of agency's legal consequences. The creator does not have a right to control the power holder's use of the power, and the power holder is not under a duty to use it in the interests of the creator. Sections 3.12- 3.13 specifically treat powers given as security.

Illustrations:
Illustrations:

15. P, a building contractor, has a credit account with T, a seller of building supplies. P tells F, P's impecunious friend, that F may buy building supplies on P's account from T for F's own use. P must pay the charges that F incurs on P's account with T. F is not P's agent in buying the building supplies because F is not acting on P's behalf.

16. Same facts as Illustration 15, except that P tells F to make purchases from T and charge them to P's account only to meet P's needs. F is P's agent in making the purchases and charging them to P's account.
17. P lends A money to purchase a piece of property, taking a mortgage on the property as security. The mortgage gives P the power to sell the property if A defaults on the loan. In exercising the power of sale, P does not act as A's agent because P is acting, not on A's behalf, but to protect P's interest as mortgagee.

Relationships of agency are among the larger family of relationships in which one person acts to further the interests of another and is subject to fiduciary obligations. Agency is not antithetical to these other relationships, and whether a fiduciary is, additionally, an agent of another depends on the circumstances of the particular relationship. For example, as defined in Restatement Third, Trusts § 2, a trust is a fiduciary relationship with respect to property that arises from a manifestation of intention to create that relationship; a trustee is not an agent of the settlor or beneficiaries unless the terms of the trust subject the trustee to the control of either the settlor or the beneficiaries. Principals in agency relationships have power to terminate authority and thus remove the agent; trust beneficiaries, in contrast, do not have power to remove the trustee.

As agents, all employees owe duties of loyalty to their employers. The specific implications vary with the position the employee occupies, the nature of the employer's assets to which the employee has access, and the degree of discretion that the employee's work requires. However ministerial or routinized a work assignment may be, no agent, whether or not an employee, is simply a pair of hands, legs, or eyes. All are sentient and, capable of disloyal action, all have the duty to act loyally. For further discussion of the scope of fiduciary duty, see § 8.01, Comment *c*.

Illustration:
Illustration:

18. A is an assembly-line worker in an aircraft manufacturing plant owned by P Corporation. A's work consists solely of inserting rivets that fasten components in aircraft bodies. A's foreman tells A to speed up production. A asks why, and the foreman responds, "The top-secret word from the plant manager is that P Corporation has received a large contract from the Defense Department." "So, is this a one-time thing?" asks A. "No," replies the foreman. "They're going to have to expand the plant because the contract will require more manufacturing space." After the day's work, as a result of what A has been told by the foreman, A buys an option to purchase land adjacent to the plant. The land is the only space on which the plant might feasibly expand. A's purchase of the option breaches A's fiduciary duty to P Corporation because it constitutes a use of nonpublic information of P Corporation without P Corporation's permission. See § 8.05(2).

h. Intermediaries. Many actors perform an intermediary role between parties who engage in a transaction. Not all are agents in any sense, and not all who are agents act on behalf of those who use the intermediary service provided. For example, an employee of a courier service who shuttles documents among parties who are closing a transaction among them is not the parties' agent simply because an intermediary function is provided.

Agents who perform intermediary functions vary greatly in the nature of the services provided. Variable as well are the scope of the agency relationship and its consequences for the principal. At the modest end of the spectrum, a translator employed by a principal in negotiations enables the principal's words to be understood by others and enables the principal to understand the language used by others. The translator does not occupy a role that conventionally involves identifying parties with whom the principal might deal or a role that confers discretionary authority to determine whether to commit the principal to the terms of a proposed transaction or to initiate or vary terms for the principal. Nonetheless, the translator's relation to the principal is one of agency. The translator acts on the principal's behalf and the principal has the power to provide interim instructions as to how the translation shall be done.

If an intermediary lacks authority even to negotiate on behalf of a party, characterizing the intermediary as an agent may not carry much practical import because the scope of the agency would be very narrow. But despite the narrowness of its scope, an agency relation imposes legal consequences when the agent's acts are within its scope. In some circumstances, an agent's inaction will have legal consequences for the principal.

Illustration:
Illustration:

19. P appoints A an agent to receive service of process. P instructs A, "Anything with which you are served in my name, send it to me by express service." A is served with a complaint in an action that names P as a defendant. A does not send the complaint to P, causing P to miss the deadline for filing an answer to the complaint. As a consequence, P's adversary in the lawsuit obtains a default judgment against P. A's receipt of process is within the scope of A's authority. P is bound by its consequences.

Appendix BB

Restatement (Second) of Agency § 14 (1958)

Restatement of the Law - Agency

Database updated October 2014
Restatement (Second) of Agency

Chapter 1. Introductory Matters

Topic 3. Essential Characteristics of Relation

§ 14 Control by Principal

Comment:

Case Citations - by Jurisdiction

A principal has the right to control the conduct of the agent with respect to matters entrusted to him.

Comment:

a. The right of control by the principal may be exercised by prescribing what the agent shall or shall not do before the agent acts, or at the time when he acts, or at both times. The principal's right to control is continuous and continues as long as the agency relation exists, even though the principal agreed that he would not exercise it. Thus, the agent is subject to a duty not to act contrary to the principal's directions, although the principal has agreed not to give such directions. See § 33. Further, the principal has power to revoke the agent's authority, although this would constitute a breach of his contract with him. See § 118. The agent cannot obtain specific performance of the principal's agreement. If the agent has notice of facts from which he should infer that the principal does not wish him to act as originally specified, the agent's authority is terminated, suspended, or modified accordingly. See § 108. The control of the principal does not, however, include control at every moment; its exercise may be very attenuated and, as where the principal is physically absent, may be ineffective.

The extent of the right to control the physical acts of the agent is an important factor in determining whether or not a master-servant relation between them exists. See § 220.

b. If it is otherwise clear that there is an agency relation, as in the case of recognized agents such as attorneys at law, factors, or auctioneers, the principal, although he has contracted with the agent not to exercise control and to permit the agent the free exercise of his discretion, nevertheless has power to give lawful directions which the agent is under a duty to obey if he continues to act as such. See § 385. If the existence of an agency relation is not otherwise clearly shown, as where the issue is whether a trust or an agency has been created, the fact that it is understood that the person acting is not to be subject to the control of the other as to the manner of performance determines that the relation is not that of agency. See § 14B.

c. There are many relations in which one acts for the benefit of another which are to be distinguished from agency by the fact that there is no control by the beneficiary. Thus, executors, guardians, and receivers, although required to act wholly for the benefit of those on whose account the relation has been established, are not subject to their directions. See § 14F. A trustee, that is, one holding property in trust for another and subject to equitable duties to deal with the property for the other's benefit, may or may not be subject to control in the management of the property by the one for whose benefit he is required to act. If he is so subject, he is also an agent, and the rules stated in the Restatement of this Subject apply to him. See § 14B. The directors of a corporation for profit are fiduciaries having power to affect its relations, but they are not agents of the shareholders since they have no duty to respond to the will of the shareholders as to the details of management. See § 14C.

Appendix CC

Restatement (Second) of Agency § 1 (1958)

Restatement of the Law - Agency

Database updated October 2014
Restatement (Second) of Agency

Chapter 1. Introductory Matters

Topic 1. Definitions

§ 1 Agency; Principal; Agent

Comment on Subsection (1):

Case Citations - by Jurisdiction

(1) Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.
(2) The one for whom action is to be taken is the principal.
(3) The one who is to act is the agent.

Comment on Subsection (1):

a. The relation of agency is created as the result of conduct by two parties manifesting that one of them is willing for the other to act for him subject to his control, and that the other consents so to act. The principal must in some manner indicate that the agent is to act for him, and the agent must act or agree to act on the principal's behalf and subject to his control. Either of the parties to the relation may be a natural person, groups of natural persons acting for this purpose as a unit such as a partnership, joint undertakers, or a legal person, such as a corporation.

b. Agency a legal concept. Agency is a legal concept which depends upon the existence of required factual elements: the manifestation by the principal that the agent shall act for him, the agent's acceptance of the undertaking and the understanding of the parties that the principal is to be in control of the undertaking. The relation which the law calls agency does not depend upon the intent of the parties to create it, nor their belief that they have done so. To constitute the relation, there must be an agreement, but not necessarily a contract, between the parties; if the agreement results in the factual relation between them to which are attached the legal consequences of agency, an agency exists although the parties did not call it agency and did not intend the legal consequences of the relation to follow. Thus, when one who asks a friend to do a slight service for him, such as to return for credit goods recently purchased from a store, neither one may have any realization that they are creating an agency relation or be aware of the legal obligations which would result from performance of the service. On the other hand, one may believe that he has created an agency when in fact the relation is that of seller and buyer. See § 14J. The distinction between agency and other relations, such as those of trust, buyer and seller, and others are stated in Sections 14A to 14O. The distinction between the kind of agent called a servant and a non-servant agent is stated in Section 2.

When it is doubtful whether a representative is the agent of one or the other of two contracting parties, the function of the court is to ascertain the factual relation of the parties to each other and in so doing can properly disregard a statement in the agreement that the agent is to be the agent of one rather than of the other, or a statement by the parties as to the legal relations which are thereby created. See § 14L. The agency relation results if, but only if, there is an understanding between the parties which, as interpreted by the court, creates a fiduciary relation in which the fiduciary is subject to the directions of the one on whose account he acts. It is the element of continuous subjection to the will of the principal which distinguishes the agent from other fiduciaries and the agency agreement from other agreements. The characteristics which tend to indicate an agency or a non-agency relation are stated in Sections 12 to 14O.

Illustrations:

Illustrations:

1. P and A enter into an agreement which is stated to be a "contract of sale." It provides that for one year A shall purchase a specified amount of goods from P; that the risk of loss of such goods after purchase is upon P, if A uses care in their custody; that A is to pay for and to sell them at prices to be fixed by P from time to time and is to keep the proceeds as a separate account, remitting monthly 90 per cent. and keeping the remainder for himself; that unsold goods can be returned to P; and that P will pay A one-half of A's selling expenses. A is P's agent.
2. B, wishing to borrow money, goes to A, the local representative of an insurance company employed by it to lend money and collect interest, and signs a document which states that A is B's agent for the purpose of borrowing money from the company, for which B is to pay A one per cent. of the money borrowed, and that payments of interest are to be made to A. Both B and A understand that A is primarily to protect the interests of the company. A is not B's agent, and payment of interest by B to A is payment to the insurance company.
3. A, the secretary of the local branch of a fraternal organization, collects money from the members of the branch, remitting it each month to the national body. The rules of the order provide that the members must pay their dues in this manner; that the local secretary is subject to the orders of the national organization as to the collection and disposition of dues, but that in receiving and forwarding dues he is the agent for the members of the local branch. It may be found that, for the collection of dues, he is the agent of the national organization and not of the members of the local branch.

Comment:

c. Confusion of terms. It is sometimes said that agency does not exist until the agent does something for the principal. In fact, the relation may exist before such time. Reciprocal duties between the parties together with a power of the agent to bind the principal are normally created at the time of the agreement. This is true although there is no binding contract between the parties. See § 16. Thus, where one asks another to purchase property for him which the other gratuitously promises to do, the other immediately has a power to bind the first by the purchase of the property and immediately becomes subject to a fiduciary duty not to buy it on his own account. This is true irrespective of the fact that either can properly terminate the relation at any time.

The agency relation is to be distinguished from other relations sometimes called agency but which do not include the elements here stated. Thus, there is sometimes said to be an "agency by necessity", in cases in which the so-called agent has no duty to respond to the will of the principal. See §§ 14I and 141. Sometimes a power of attorney given for security has been thought to be a form of agency although the power holder has no duty to respond to the will of the one creating the power. See §§ 14H, 138, 139. In such cases the rules of agency as herein stated do not apply.

Comment on Subsection (2):

d. "Principal" is a word used to describe a person who has authorized another to act on his account and subject to his control. It includes, therefore, both a person who has directed another to act on his account in business dealings or to represent him in hearings or proceedings, but who has no control or right of control over the other's physical conduct, and also a person who employs another to act in his affairs, having such control or right to control over his conduct that the other is termed a servant, whether or not he renders merely manual service. The word "master" as defined in Section 2 is not used in contrast to the word "principal," but is included within it. Thus, the owner of a business is a principal not only with regard to brokers who, as to their physical acts, are independent of his supervision, but also with regard to salesmen who conduct business transactions under supervision as to such conduct and who therefore come within the definition of servant. Likewise, the owner of a house is the principal as well as the master of the janitors whom he employs and whose jobs are confined to the performance of manual acts on the premises under the owner's supervision. The word "principal," therefore, includes both persons who are masters and persons who are principals but not masters.

Comment on Subsection (3):

e. "Agent" is a word used to describe a person authorized by another to act on his account and under his control. Included within its meaning are those who, whether or not servants as described in Section 2, act in business transactions and those who perform only manual labor as servants. An agent may be one for whose physical acts the employer is not responsible and who is called an independent contractor in order to distinguish him from a servant, also an agent, for whose physical acts the employer is responsible. Thus, the attorney-at-law, the broker, the factor, the auctioneer, and other similar persons employed either for a single transaction or for a series of transactions, are agents, although as to their physical activities they are independent contractors. These are to be contrasted with others, such as clerks, train conductors, and others who conduct transactions with third persons but who fall within the category of servants. Likewise, the janitor of a building or the driver of a truck is an agent, as that word is used in the Restatement of this Subject, if he is employed under such circumstances that he becomes a servant. For many purposes it is immaterial whether or not one who is an agent is also a servant. However, the liability of a master for the torts of his servant is greater in extent than the liability of a principal for the torts of an agent who is not a servant (see §§ 219- 255), and a master's duties to servants are different from those of a principal to agents who are not servants. See §§ 472- 528.

f. Statutory use. Whether the word "agent" as used in a statute corresponds to the meaning here given depends, with other factors, upon the purpose of the statute. Thus, the purpose of statutes providing for substituted service of process on a public official is to satisfy the due process requirement of the United States Constitution. Although such a statute may label the public official an "agent" for receiving service of process, he is not an agent in the sense used herein. He is not in fact designated by the one on whose account he "accepts service", nor does he respond to that person's directions. So, in a statute which fixes the method of payment of all "public officers and agents", the word "agents" may be interpreted in a restricted sense to exclude a clerk employed by the state. The word "agent" in a criminal statute does not normally include other fiduciaries such as receivers, although some statutes may be interpreted to include them.

g. Power holders not agents. The language of agency has been used to describe as agents persons who bind others, or even act in the name of others, but do so for their own purposes. This has resulted from various causes. Thus, at a time when contracts were considered to be purely personal relations between the parties, a contractor could not transfer his right to another. However, one could appoint an agent to collect money due on the contract, the document of agreement being called a power of attorney. When economic reasons made it desirable to recognize assignments, it was not too difficult to hold that one could agree with an "attorney" that the latter should keep the proceeds. In accordance with this point of view, a mortgagee was given a "power of attorney" to sell the mortgagor's interests in the mortgaged property. In doing this the courts created a power for security. Such a power is not an agency power and the holder of one is not an agent of the one who created it. See § 138.

Case Citations - by Jurisdiction

U.S.

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Appendix DD

Restatement (Third) Of Agency § 7.06 (2006)

Restatement of the Law - Agency

Database updated October 2014
Restatement (Third) of Agency

Chapter 7. Torts—Liability of Agent and Principal

Topic 2. Principal's Liability

§ 7.06 Failure in Performance of Principal's Duty of Protection

A principal required by contract or otherwise by law to protect another cannot avoid liability by delegating performance of the duty, whether or not the delegate is an agent.

Comment:

a. Scope and cross-references. This section states the basic tort-law principle that a principal may be subject to liability to a third person when the principal is under a duty to protect that person. The principle is often termed one of "nondelegable" duty because a principal is not relieved of liability on the basis that the principal has delegated performance of the duty to another person, whether or not that person is an agent of the principal. It is beyond the scope of this Restatement whether such a duty is present in particular circumstances, as is the applicability or inapplicability of this duty to governmental actors.

Courts have found nondelegable duties to use reasonable care to be present in the situations identified by Restatement Second, Torts §§ 416 to 429. These include the performance of work that is dangerous in the absence of specific precautions, see id. § 416, and the performance of work that has inherent dangers, see id. § 427. Additionally, in some circumstances tort law imposes liability without regard to a defendant's negligence or intent to cause harm. Such liability may not be avoided by delegating performance of the activity that occasions the tort. Courts have imposed strict liability in the circumstances identified by Restatement Third, Torts: Liability for Physical Harm §§ 20 to 23 (Proposed Final Draft No. 1, 2005). These include carrying on an abnormally dangerous activity, see id. § 20, and owning or possessing a wild animal, see id. § 22.

b. In general. Delegating performance of a duty does not in itself discharge the duty unless the person to whom the duty is owed so agrees. See Restatement Second, Contracts § 318(3). This basic principle has the effect of expanding the range of circumstances in which an actor's tortious conduct subjects a principal to liability to a third party because it is not limited by whether the actor has a relationship of agency with the principal, whether the principal has chosen the actor with reasonable care, or, if the actor is an employee, by whether the employee's tortious conduct occurs within the scope of employment under § 7.07(2).

The circumstances under which a principal is subject to liability for the negligence of a person who is not an agent and who has been chosen by the principal to perform work are stated in detail in Restatement Second, Torts §§ 416 to 429. For example, if the work to be done poses a "peculiar risk of physical harm to others unless special precautions are taken," a principal is subject to liability to a third party who is injured when the actor whom the principal engages to do the work fails to take reasonable care to take such precautions. Id. § 416. The underlying principle is that "the employer remains liable for injuries resulting from dangers which he should contemplate at the time that he enters into the contract, and cannot shift to the contractor the responsibility for such dangers, or for taking precautions against them." Id., Comment *a*. Likewise, a

principal remains liable to third parties for harm caused when the principal knows or has reason to know that the work involves "an abnormally dangerous activity," to the same extent had the principal undertaken the work itself. Id § 427A. On the definition of abnormally dangerous activities, see Restatement Third, Torts: Liability for Physical Harm § 20 (Proposed Final Draft No. 1, 2005).

Reporter's Notes

a. Relationship to Restatement Second, Agency. This section corresponds to Restatement Second, Agency § 214.

b. In general. On governmental actors, see, e.g., Logue v. United States, 412 U.S. 521 (1973) (for purposes of Federal Tort Claims Act, personnel in charge of county jail that housed federal prisoner were neither federal employees nor a federal agency).

On common carriers' duties, see generally W. Page Keeton et al., Prosser & Keeton on The Law of Torts § 34 (5th ed. 1984). Compare Nazareth v. Herndon Ambulance Serv., Inc., 467 So. 2d 1076, 1078 (Fla.Dist.App.1985) (implied contract between victim-passenger and carrier subjects carrier to "extraordinary duty" that "does not terminate until the journey is complete"; duty would subject ambulance service to liability to passenger allegedly raped by attendant during trip in ambulance) with Adams v. New York City Transit Auth., 666 N.E.2d 216 (N.Y.1996) (employer not subject to liability on basis of assault against passenger by clerk in subway-token booth because attack was outside scope of employment), overruling Stewart v. Brooklyn & Crosstown R.R. Co., 90 N.Y. 588 (N.Y.1882).

In admiralty cases, it was long assumed that a ship owner was subject to liability for its employees' misconduct against passengers. See New Jersey Steamboat Co. v. Brockett, 121 U.S. 637 (1887) (ship owner liable when employee forcibly removed passenger from area of ship); New Orleans & N.E.R.R. Co. v. Jopes, 142 U.S. 18 (1891) (extending owner's strict liability under *Brockett* to circumstances in which employee acted outside scope of employment, as by shooting passenger). In Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 632 (1959), the Court held that "the owner of a ship in navigable waters owes to all who are on board for purposes not inimical to his legitimate interests the duty of exercising reasonable care under the circumstances of each case." *Kermarec* did not overrule *Brockett* or *Jopes*, however, and involves not an employee's tort against a passenger but a passenger's fall down a defectively constructed staircase. District courts within the Second Circuit interpret *Kermarec* to eliminate vicarious liability for employees' intentional torts against passengers. See, e.g., York v. Commodore Cruise Line, Inc., 863 F.Supp. 159, 162 (S.D.N.Y.1994). Courts in other circuits, however, continue to hold ship owners vicariously liable for crew members' willful misconduct against passengers. See, e.g., Doe v. Celebrity Cruises, Inc., 394 F.3d 891 (11th Cir.2004), cert. denied, 126 S. Ct. 548 (2005); Morton v. De Oliveira, 984 F.2d 289 (9th Cir.1993); Muratore v. M/S Scotia Prince, 845 F.2d 347 (1st Cir.1988); Jackson Marine Corp. v. M/V Blue Fox, 845 F.2d 1307 (5th Cir.1988).

Case Citations - by Jurisdiction

C.A.11

C.A.11, 2004. Quot. in ftn., com. (a) and Rptr's Note quot. in ftn. (T.D. No. 5, 2004). Cruise-ship passenger who was sexually assaulted by male crew member brought suit for damages against ship operator, ship owner, caterer, and catering-service company. Although jury found for plaintiff, district court granted judgment as a matter of law for defendants, finding that plaintiff failed to prove liability of any single defendant as both a common carrier and crew member's employer. Reinstating and affirming the jury verdict, and reversing and remanding the district court's entry of judgment, this court held, inter alia, that because a nondelegable duty to protect was imposed by the carrier-passenger relationship, a cruise line was strictly liable under federal maritime law for crew-member assaults on passengers during cruise. Doe v. Celebrity Cruises, Inc., 394 F.3d 891, 909, certiorari denied 546 U.S. 998, 126 S.Ct. 548, 163 L.Ed.2d 499 (2005).

End of Document

Appendix EE

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)(1), 33 U.S.C.A. §912(d)(3)(1), 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 (1) 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)(1).[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. 83-2434: Audrey M. Derocher (Widow of Percy Derocher) v. Crescent Wharf and Warehouse (Case No. 82-LHCA-2543) (OWCP No. 13-59488)

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Appendix FF

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

Appendix GG

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.