BRB No. 04-0437

LINTON DE LA CRUZ	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CB TECH SERVICES, INCORPORATED	)	
	)	
and	)	
	)	
HAWAII INSURANCE GUARANTY ASSOCIATION	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
BAY HARBOR COMPANY	)	DATE ISSUED: 01/27/2005
	)	
and	)	
	)	
HAWAII EMPLOYERS' MUTUAL INSURANCE COMPANY	)	
	)	
and	)	
	)	
WAUSAU INSURANCE COMPANY	)	
	)	
Employer/Carriers-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Anne Beytin Torkington, Administrative Law Judge, United States Department of Labor.

Steven M. Birnbaum, San Francisco, California, for claimant.

Scott G. Leong and Normand R. Lezy (Leong, Kunihiro, Leong & Lezy), Honolulu, Hawaii, for CB Tech Services, Incorporated.

Robert C. Kessner and Sylvia K. Higashi (Kessner Duca Umbeyashi Bain & Matsunaga), Honolulu, Hawaii, for Bay Harbor Company.

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

PER CURIAM

Employer, CB Tech Services, Incorporated, ("CB") appeals the Decision and Order Awarding Benefits (2002-LHC-2330, 2002-LHC-2331 and 2002-LHC-2332) of Administrative Law Judge Anne Beytin Torkington on claims filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they 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).

Claimant initially injured his back while working for Bay Harbor Company ("Bay Harbor") as a laborer on April 8, 1997. He was diagnosed with an acute severe lumbosacral muscle strain and placed on off-work status. Claimant subsequently returned to his usual work with Bay Harbor, and shortly thereafter was promoted to a supervisory position which eliminated the majority of the heavy labor previously required in his position of laborer. Claimant continued to seek treatment for his back condition and an MRI dated October 3, 1997, revealed degenerative disc disease at L4-5 and L5-S1 levels, which prompted claimant's chiropractor, Dr. Yoza, and an examining physician, Dr. Kimura, to each opine that claimant may have intermittent recurrences and aggravations due to the condition of his back. On April 20, 1999, claimant, while moving heavy buckets for Bay Harbor, sustained, as diagnosed by Dr. Fryberg, an "exacerbation of low back pain with past history of L5-S1 herniation," Bay Harbor Exhibit 9 at 425, thus prompting claimant to file a claim against Bay Harbor on August 4, 1999. On November 18, 1999, Dr. Hannon opined that claimant reached maximum medical improvement with regard to his back condition with permanent work restrictions including no lifting or carrying over 25 pounds.

A reduction of pay following the 1999 injury led claimant, on January 17, 2000, to leave Bay Harbor to work for CB. Claimant informed CB of his pre-existing back condition, but testified that his employment was more strenuous than he expected and

beyond his work restrictions.[1] On March 24, 2000, claimant reported continued back and leg pain and numbness in both legs to examining physician Dr. Hannon. On April 17, 2000, claimant was laid off by CB due to a lack of work; claimant's last day of work with CB was April 14, 2000. On May 16, 2001, claimant filed a claim under the Act against CB.

On March 12, 2001, claimant was hired by Terminix as a pest control specialist. While at home following a day's work for Terminix on June 24, 2002, claimant collapsed after one of his legs gave out. HT at 79. The next day, Dr. Lee took claimant out of work, and advised him to avoid excessive bending, twisting of the neck and back and to do no lifting. An MRI performed on August 30, 2002, revealed disc protrusions at L4-5 and L5-S1 with chronic, presently incapacitating left lumbosciatic pain. Claimant has not worked since his collapse.

In his decision, the administrative law judge found that claimant established a *prima facie* case that his work for CB aggravated his pre-existing back condition under Section 20(a), 33 U.S.C. §920(a), and that CB established rebuttal by showing that claimant may have subsequently aggravated his back condition while employed at Terminix. Considering the evidence as a whole, the administrative law judge found that claimant did not sustain any subsequent aggravating injury while employed at Terminix, and thus concluded that CB, as the responsible employer, is liable for claimant's compensation and medical benefits. 33 U.S.C. §907; Decision and Order at 18-19. The administrative law judge next found timely claimant's notice of injury and claim for a back injury against CB. 33 U.S.C. §§912(a), 913(a). Consequently, the administrative law judge awarded claimant compensation for periods of temporary total, temporary partial and permanent partial disability as well as medical benefits from April 15, 2000, and found CB liable for payment.

On appeal, CB challenges the administrative law judge's findings regarding claimant's timely notice of his injury and its designation as the responsible employer. Bay Harbor responds, agreeing with the administrative law judge's determination that it is not the responsible employer in this case. Claimant responds, urging affirmance of the administrative law judge's decision.

CB asserts that administrative law judge erred in concluding that claimant gave timely notice to CB of his cumulative trauma injury pursuant to Section 12(a). In

[1] Claimant testified that while employed at CB he was required to carry buckets weighing up to 100 lbs., operate large machinery, bend repetitively, squat, stoop, crawl, work on his knees, twist his upper body, work in cramped space, and climb ladders. HT at 57-58, 60-62, 84.

particular, CB avers that the cases relied upon by the administrative law judge, *Smith v. Aerojet-General Shipyards, Inc.*, 647 F.2d 518, 13 BRBS 391 (5th Cir. 1981), and *Osmundsen v. Todd Pacific Shipyard*, 18 BRBS 112 (1986), were improperly applied to the instant case inasmuch as those cases involved occupational diseases and not, as in the instant case, a traumatic injury. Additionally, CB argues that the record establishes that claimant knew, or should have known, of the relationship between his aggravated back injury and his employment with CB during his actual period of employment, and thus, that he should have provided CB notice, at the very least, within 30-days after he left CB's employ, on April 17, 2000.

Under Section 12(a), an employee in a traumatic injury case is required to notify the employer of his work-related injury within 30 days after the date of injury or the time when the employee was aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment and the disability. *See Bechtel v. Associates, P.C. v. Sweeney*, 834 F.2d 1029, 20 BRBS 49(CRT) (D.C.Cir. 1987); 20 C.F.R. §702.212(a). Under this standard, it has been held that an employee is not injured for the purposes of the statute of limitations until he knows or should know "the true nature of his condition, *i.e.*, that it interferes with his employment by impairing his capacity to work, and its causal relationship with his employment." *Marathon Oil Co. v. Lunsford*, 733 F.2d 1139, 1141, 16 BRBS 100, 101(CRT) (5th Cir. 1984).[2] Thus, claimant need not give notice of his injury until he is aware that his work-related injury is impairing his earning capacity. *See Love v. Owens-Corning Fiberglass Co.*, 27 BRBS 148 (1993); *see also Abel v. Director, OWCP*, 932 F.2d 819, 24 BRBS 130(CRT) (9th Cir. 1991); *J.M. Martinac Shipbuilding v. Director, OWCP*, 900 F.2d 180, 183, 23 BRBS 127, 129(CRT) (9th Cir. 1990); *Bath Iron Works Corp. v. Galen*, 605 F.2d 583, 10 BRBS 863 (1st Cir. 1979). In the absence of evidence to the contrary, it is presumed, pursuant to Section 20(b) of the Act, 33 U.S.C. §920(b), that employer has been given sufficient notice under Section 12. *See Shaller v. Cramp Shipbuilding & Dry Dock Co.*, 23 BRBS 140 (1989).

In the instant case, the administrative law judge put forth alternative grounds for determining that while claimant did not provide notice to CB within 30 days of April 14, 2000, *i.e.*, the last day upon which claimant could have sustained cumulative trauma at CB, his notice to CB was nevertheless timely as he did not become aware of the relationship between his disabling injury and his employment with CB until well after

[2]Although the statement in *Lunsford* was made in reference to the filing requirements of Section 13 of the Act, 33 U.S.C. §913, the United States Court of Appeals for the Ninth Circuit, within whose jurisdiction the instant case arises, has noted that the language of Section 12 mirrors that of Section 13. *See, e.g., Abel v. Director, OWCP*, 932 F.2d 819, 821 n.4, 24 BRBS 130, 135 n.4(CRT) (9th Cir. 1991); *see also Stancil v. Massey*, 436 F.2d 724 (D.C. Cir. 1970).

that date. First, the administrative law judge found, based, in part, upon the decision of the United States Court of Appeals for the Fifth Circuit in *Smith*, 647 F.2d 518, 13 BRBS 391, that the 30-day time limit of Section 12(a) did not commence until claimant became aware that CB "might be liable under the last responsible employer rule," Decision and Order at 20, which, in the instant case, did not occur until after claimant's previous employer, Bay Harbor, was "exculpated" from liability as of the issuance of the instant decision. Decision and Order at 20. Thus, the administrative law judge concluded that it was not possible for CB to be liable as a matter of law until Bay Harbor was relieved of potential liability.

Second, the administrative law judge found that the medical evidence of record establishes that claimant "had no impairment of which he could be aware until the progression of his condition, caused by the cumulative trauma injury of 2000, became apparent." Decision and Order at 21. The administrative law judge found that no physician identified cumulative trauma until Dr. Hager's diagnosis based on an examination on February 9, 2002. Claimant's Exhibit 3. In his corresponding report, Dr. Hager opined that claimant's back condition was caused by the 1997 injury sustained while claimant worked for Bay Harbor, but it was permanently aggravated by claimant's work at CB. HT at 157. The administrative law judge further found that "claimant's inability to find work after leaving CB did not put him on notice that his earning power had been impaired," *id.*, since, because claimant was laid off by CB due to a lack of work and not because of his physical condition, claimant had no way of realizing that his traumatic injury compromised his earning capacity. The administrative law judge therefore concluded that claimant provided a timely notice of injury to CB and also timely filed his claim against CB because he filed his claim, thereby providing CB with timely notice of injury, prior to the time he gained awareness of the relationship between his injury, his work with CB, and a resulting impairment to his earning capacity.

We affirm the administrative law judge's determination that claimant's notice to employer complies with the requirements of Section 12(a) as it is supported by substantial evidence. Specifically, the administrative law judge considered the entirety of relevant evidence and in a permissible exercise of his discretion concluded that claimant was not aware of the relationship between his cumulative trauma injury and his employment with CB until such time as he was diagnosed with the condition. *Love*, 27 BRBS 148; *Abel*, 932 F.2d 819, 24 BRBS 130(CRT); *J.M. Martinac Shipbuilding*, 900 F.2d 180, 183, 23 BRBS 127, 129(CRT). Thus, as the claim against CB was filed on May 16, 2001, well before Dr. Hager's diagnosis of a cumulative trauma injury related to claimant's work with CB on February 9, 2002, claimant satisfied the notice and filing provisions of Sections 12 and 13 in a timely manner.[3] 33 U.S.C. §§912, 913.

[3] As we affirm the administrative law judge's finding that claimant's notice and filing of his claim are timely based upon the fact that claimant's awareness, for purposes

CB next argues that its designation as responsible employer was erroneous as the evidence of record establishes that claimant's work with Terminix, his most recent employer, caused an aggravation of his back injury. Alternatively, CB argues that since the administrative law judge determined that the evidence regarding the responsible employer issue is in equipoise, Terminix must be, for purposes of the Act, the responsible employer in this case.

The United States Court of Appeals for the Ninth Circuit has stated that the rule for determining which of several covered employers under the Act is liable for the totality of claimant's disability in a case involving cumulative traumatic injuries is applied as follows: if the disability results from the natural progression of an initial injury and would have occurred notwithstanding a subsequent injury, then the initial injury is the compensable injury and accordingly the employer at the time of that injury is responsible for the payment of benefits. If, on the other hand, the subsequent injury aggravates, accelerates, or combines with claimant's prior injury, thus resulting in claimant's disability, then the subsequent injury is the compensable injury and the subsequent employer is fully liable. *Metropolitan Stevedore Co. v. Crescent Wharf & Warehouse Co. [Price]*, 339 F.3d 1102, 37 BRBS 89(CRT) (9th Cir. 2003), *cert. denied*, 125 S.Ct. 309 (2004); *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71(CRT) (9th Cir. 1991); *see also Buchanan v. Int'l Transp. Services*, 33 BRBS 32 (1999), *aff'd mem. sub nom. Int'l Transp. Services v. Kaiser Permanente Hosp., Inc.*, 7 Fed.Appx. 547 (9th Cir. 2001). The administrative law judge properly applied this precedent in concluding that CB rather than claimant's prior Longshore employers was the responsible employer under the Act. Terminix, however, is not a covered Longshore employer and thus the issue does not involve allocating liability between covered employers but rather whether claimant's disability is the result of a subsequent event outside of work. Where the last covered employer seeks to be absolved of partial or total liability based on the occurrence of a subsequent event with a non-covered employer, the Longshore employer must demonstrate that the event is an intervening cause of the claimant's disability by showing that it is the cause of claimant's disability. *See, e.g., Shell Offshore, Inc. v. Director, OWCP*, 112 F.3d 312, 31 BRBS 129(CRT) (5th Cir. 1997), *cert. denied*, 523 U.S. 1095 (1998); *Bludworth Shipyard, Inc. v. Lira*, 700 F.2d 1046, 15 BRBS 120(CRT) (5th Cir. 1983); *Cyr v. Crescent Wharf & Warehouse Co.*, 211 F.2d 454 (9th Cir. 1954); *Plappert v. Marine Corps Exch.*, 31 BRBS 13, *aff'd on recon. en banc*, 31 BRBS 109 (1997); *Leach v. Thompson's Dairy*, 13 BRBS 231 (1981). In such instances, employer remains liable for any disability attributable to the work injury,

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of Section 12(a), post-dated the filing of his claim, we need not specifically address CB's assertion that the occupational disease cases relied upon, in part, by the administrative law judge are inapplicable to this traumatic injury case.

and is relieved of liability only for the disability attributable to the intervening cause.[4] *Leach*, 13 BRBS 231; *see also generally New Haven Terminal Corp. v. Lake*, 337 F.3d 261, 37 BRBS 73(CRT) (2d Cir. 2003)(last employer rule is not a defense).

In the instant case, the administrative law judge initially found that claimant's medical records are inconclusive as to the cause of his June 24, 2002, collapse and ensuing disability. The administrative law judge also found evidence that claimant had problems with his back while at Terminix prior to his June 24, 2002, collapse and that Drs. Hager, Diamond, and Holmes each testified that claimant's work at Terminix could have caused claimant's condition to worsen, thus contributing to his current disability. Nevertheless, the administrative law judge relied predominantly on the additional statements by Drs. Hager and Holmes, Bay Harbor Exs. 40, 41, that claimant's work with CB more likely aggravated his back injury than his work at Terminix, to find that claimant's collapse while employed at Terminix and ensuring disability were the result of the natural progression of claimant's pre-existing injury which was aggravated while employed at CB. Decision and Order at 19. In addition, the administrative law judge concluded that claimant's collapse on June 24, 2002, was arguably the last in a series of flare-ups occurring on a periodic basis after claimant left CB,[5] and that this evidence bolsters the opinions of Drs Hager and Holmes that claimant's disabling condition is more likely related to his employment at CB, as it establishes a pattern which pre-dates his employment at Terminix. As such, the administrative law judge determined that CB failed to establish that claimant's disability was due to an aggravation at Terminix and found it was thus the result of the natural progression of claimant's prior condition, which was last aggravated at CB.[6] *See Shell Offshore*, 112 F.3d 312, 31 BRBS 129(CRT); *Lira*,

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[4] In this regard, we note that the administrative law judge incorrectly stated that CB would not be liable if claimant's work while at Terminix caused an aggravated his condition. Decision and Order at 17. Nevertheless, any error in this regard is harmless as CB has not established that claimant's present disability is due to any intervening cause sustained while employed at Terminix. *Shell Offshore*, 112 F.3d 312, 31 BRBS 129(CRT); *Lira*, 700 F.2d 1046, 15 BRBS 120(CRT); *Cyr*, 211 F.2d 454; *Plappert*, 31 BRBS 13; *Leach*, 13 BRBS 231.

[5] In particular, the administrative law judge found evidence of flare-ups during claimant's unemployment, sometime around December 29, 2000, and then another, while employed at Terminix, on or around May 30, 2001. The administrative law judge further found persuasive the fact that during the time that claimant was employed at Terminix, he was working within his restrictions, while his work at CB exceeded his restrictions.

[6] We reject CB's assertion that the administrative law judge's statement that the relevant evidence is in equipoise mandates a finding that Terminix is the responsible employer. First, as a non-longshore employer, Terminix cannot be liable for any benefits under the Act. *See* 33 U.S.C. §902(4); *Leach*, 13 BRBS 231. Second, while the

700 F.2d 1046, 15 BRBS 120(CRT); *Cyr*, 211 F.2d 454; *Plappert*, 31 BRBS 13; *Leach*, 13 BRBS 231. As the administrative law judge's conclusion is supported by substantial evidence, it is affirmed. *Id.* Consequently, we affirm the administrative law judge's decision that CB is liable for claimant's benefits in this case.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

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administrative law judge indicated that the pertinent evidence was in equipoise, Decision and Order at 19, he, at same time, concluded that CB did not meet its burden with regard to the pertinent issue of intervening cause, *i.e.*, that claimant's injury with CB did not play any role in his present, post-Terminix, disability. *See Plappert v. Marine Corps Exchange*, 31 BRBS 13, *aff'd on recon. en banc*, 31 BRBS 109 (1997); *James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989).