

BRB No. 93-1325

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|--------------------------|---|--------------------|
| DONALD L. JOHNSON        | ) |                    |
|                          | ) |                    |
| Claimant-Respondent      | ) |                    |
|                          | ) |                    |
| v.                       | ) |                    |
|                          | ) |                    |
| CRUSTY PIE COMPANY,      | ) |                    |
| INCORPORATED             | ) |                    |
|                          | ) | DATE ISSUED:       |
| and                      | ) |                    |
|                          | ) |                    |
| ZURICH INSURANCE COMPANY | ) |                    |
|                          | ) |                    |
| Employer/Carrier-        | ) |                    |
| Petitioners              | ) | DECISION and ORDER |

Appeal of the Compensation Order Award of Death Benefits of Maria Borrero, District Director, United States Department of Labor.

Patrick S. Guilfoyle (Ashcraft & Gerel), Washington, D.C., for claimant.

Joseph S. Michael (Montedonico, Hamilton & Altman, P.C.), Frederick, Maryland, for employer/carrier.

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

PER CURIAM:

Employer appeals the Compensation Order Award of Death Benefits (Case No. 40-015388) of District Director Maria Borrero, rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (1982), as extended by the District of Columbia Workmen's Compensation Act, 36 D.C. Code §§501, 502 (1973)(the Act). The determinations of the district director must be affirmed unless they are shown to be arbitrary, capricious, an abuse of discretion or not in accordance with law. *Sans v. Todd Shipyards Corp.*, 19 BRBS 24 (1986).

The decedent, Florence I. Giles-Johnson, was awarded permanent total disability benefits under the D.C. Act by Administrative Law Judge John I. Nevin on February 18,

1975.<sup>1</sup> Ms. Johnson died on November 23, 1992, and on January 27, 1993, claimant, decedent's spouse, filed a claim for death benefits on behalf of himself and a grandson. See 33 U.S.C. §909 (1982).<sup>2</sup> On March 2, 1993, District Director Maria Borrero issued a Compensation Order awarding death benefits to claimant and to the decedent's grandson, Deon D. Giles-Johnson, as well as funeral expenses. This appeal followed.

On appeal, employer contests the award, asserting that claimant failed to provide timely notice of the death under Section 12, 33 U.S.C. §912 (1982). Employer also avers that it received no written notice of the claim until the compensation order was issued by the district director. As a result "[employer] was deprived of its right to a hearing on the issue of compensability and dependents." Petition for Review at 2; see Emp. Brief at 2-3. Employer also challenges the award to the grandson, Deon D. Giles-Johnson, asserting that because his dependency did not exist at the time of the employee's injury, he cannot be entitled to death benefits. Claimant concedes this latter argument, and urges the Board to remand the claim to the district director for a modification of the Compensation Order on that issue alone. Claimant contends employer's argument regarding Section 12 is without merit. Claimant asserts that as decedent's death is not work-related, and as employer was aware of decedent's permanent total disability that formed the basis of the death benefits claim, Section 12 is inapplicable.

Section 12(a) of the Act provides that notice of the injury or death to be compensated must be given within "thirty days after the ... beneficiary is aware, or in the exercise of reasonable diligence ... should have been aware, of a relationship between the [employee's] death and the [factors which give rise to claimant's entitlement to benefits]." 33 U.S.C. §912(a)(1982). Failure to give notice will not bar a claim if the employer had knowledge of the death and it is determined that employer was not prejudiced by failure to provide notice. 33 U.S.C. §912(d)(1)(1982); see *Bechtel Associates, P.C. v. Sweeney*, 834 F.2d 1029, 1032, 20 BRBS 49, 54 (CRT)(D.C.Cir. 1987). Section 20(b), 33 U.S.C. §920(b), aids a claimant in this regard and creates a presumption that, in the absence of substantial evidence to the contrary, employer has knowledge of the injury and was not prejudiced by a claimant's failure to provide notice pursuant to Section 12. See *Forlong v. American Security & Trust Co.*, 21 BRBS 155, 159 (1988).

Employer's assertions of lack of any notice and the resultant opportunity to obtain independent confirmation of facts such as Ms. Johnson's death or her widower's status as

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<sup>1</sup>There were no findings pertaining to any dependents made by the administrative law judge.

<sup>2</sup>Under the Act as amended in 1972 and as applicable to this claim, death benefits are payable to eligible survivors if the employee was permanently totally disabled at the time of a non-work-related death, as it appears is the situation in this case. See *Shea, S & M Ball Co. v. Director, OWCP*, 929 F.2d 736, 24 BRBS 170 (CRT)(D.C.Cir. 1991).

a qualified dependent, involve questions of fact regarding the applicability of Section 12. Because Section 19(d) of the Act, 33 U.S.C. §919(d), provides that fact-finding authority rests with the administrative law judge, see *Toyer v. Bethlehem Steel Corp.*, 28 BRBS 347, 353 (1994)(McGranery, J., dissenting); *Maine v. Brady-Hamilton Stevedore Co.*, 18 BRBS 129 (1986), the administrative law judge and not the district director must in the first instance determine the applicability of Section 12, and if so, whether employer received adequate notice of decedent's death and, if not, whether such failure is excused pursuant to Section 12(d). See *generally Maine*, 18 BRBS at 129. Because employer is entitled to a hearing on these issues, as well as on issues of dependency,<sup>3</sup> we must vacate the Compensation Order issued by the district director, and remand this case to the district director for further proceedings as appropriate. See 20 C.F.R. §702.331.

Accordingly, the Compensation Order awarding death benefits is vacated and this case is remanded to the district director for proceedings consistent with this opinion.

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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NANCY S. DOLDER  
Administrative Appeals Judge

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<sup>3</sup>Section 9(f) provides that "[a]ll questions of dependency shall be determined as of the time of the injury." 33 U.S.C. §909(f); see also 33 U.S.C. §902(14).