

BRB Nos. 93-1679 and  
93-1679A

TOM ORLANDO )  
)  
Claimant-Petitioner )  
Cross-Respondent )  
)  
v. )  
)  
UNIVERSAL DREDGING ) DATE ISSUED:  
CORPORATION )  
)  
and )  
)  
INDUSTRIAL INSURANCE COMPANY )  
OF HAWAII, LTD. )  
)  
Employer/Carrier- )  
Respondents )  
Cross-Petitioners ) DECISION and ORDER

Appeal of the Decision and Order of Nathum Litt, Chief Administrative Law Judge, United States Department of Labor.

Calvin J. Fukuhara, Hilo, Hawaii, for claimant.

Wesley M. Fujimoto and Lawrence I. Kawasaki (Dwyer, Imanaka, Scraff, Kudo, Meyer & Fujimoto), Honolulu, Hawaii, for employer/carrier.

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

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order (92-LHC-66) of Chief Administrative Law Judge Nathum Litt 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.* (the Act). We must affirm the findings of fact and the conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

On November 21, 1974, claimant injured his back while working as an apprentice oiler for

employer. Employer voluntarily paid him temporary total disability compensation for various periods between November 25, 1974 and June 30, 1975. In September 1975, the district director contacted claimant and informed him that unless he secured suitable employment on his own, he was to contact the counseling service division of the state employment service to assess suitable alternate job prospects. In addition, the district director attached a pre-typed claim filing form which claimant signed and returned on September 12, 1975. RX. J at 399.<sup>1</sup> The district director thereafter provided employer with a copy of the claim letter and employer wrote to claimant, requesting that he meet with a claims examiner. Claimant, however, failed to respond. Although claimant ultimately underwent unsuccessful back surgery in 1980 and has remained unemployed with limited exception since August 1975, he did not formally request that his claim be reopened until July 21, 1988, at which time he asserted entitlement to additional total disability compensation. CX. 1 h.

After rejecting employer's assertions that the claim form which claimant filed on September 12, 1975 was an impermissible protective filing, and that claimant's right to pursue his claim should be barred under the doctrine of laches, the administrative law judge found that the September 12, 1975, claim, which had been timely filed but never adjudicated, remained open and served to satisfy the statutory requirements of Section 13(a) of the Act, 33 U.S.C. §913(a). The administrative law judge, however, denied the claim for additional compensation, finding that the work injury had resulted in only a mild temporary sprain from which claimant had fully recovered by June 30, 1975, and that any disability he suffered involving his back thereafter was due to an underlying congenital defect.<sup>2</sup>

Claimant appeals the denial of benefits, asserting that the administrative law judge's finding that his disability after June 30, 1975, is the result of a congenital defect rather than the work-related injury is not supported by substantial evidence and that the overwhelming weight of the evidence demonstrates that his disability is due to the work injury. Employer responds, urging that the denial of disability compensation be affirmed. In addition, employer has filed a protective cross-appeal, in which it challenges the administrative law judge's finding that the claim was timely. Claimant responds to employer's cross-appeal, asserting that employer's allegations of error should be rejected.

After consideration of the administrative law judge's Decision and Order in light of the relevant evidence and claimant's arguments, we affirm his denial of additional disability compensation because his finding that the 1974 work injury represented an acute temporary episode

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<sup>1</sup>The pre-typed claim form indicated that the claim had been filed for purposes of meeting the statutory limitation period and expressed claimant's wish that the claim remain open in the event that he may require additional medical treatment or suffer additional disability.

<sup>2</sup>The administrative law judge also questioned whether claimant was disabled at all, noting that while he purportedly was unable to engage in any type of labor and declined to participate in vocational rehabilitation efforts, he nevertheless remained capable of going on hunting trips involving "day long treks through difficult terrain," thereby establishing that he is capable of undertaking lengthy and often arduous physical exertion. Decision and Order at 14.

superimposed on claimant's underlying congenital sacralization, is rational, in accordance with applicable law, and is supported by the 1975 medical reports of claimant's treating physician, Dr. Lance, RX. J at 410, 432, 452, which the administrative law judge acted within his discretion in crediting.<sup>3</sup> See *O'Keefe*, 380 U.S. at 359; *Holmes v. Universal Maritime Service*, 29 BRBS 18, 21-22 (1995).

In establishing the cause of a disabling condition, claimant is aided by the Section 20(a) presumption. *Kubin v. Pro-Football, Inc.*, 29 BRBS 117, 118-119 (1995). In the present case, the Section 20(a) presumption is invoked, inasmuch as it is undisputed that claimant suffered harm to his back and the work accident occurred. *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). The administrative law judge did not analyze the evidence in terms of invocation of the Section 20(a) presumption, although he summarily stated it was rebutted. Any error in this regard, however, is harmless because the administrative law judge fully considered and weighed the relevant evidence, and his ultimate conclusion that claimant's disability after June 30, 1975 was not related to the work injury is supported by substantial evidence. See *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140, 145 (1992). The medical records of Dr. Lance, which indicate that claimant only suffered a temporary back sprain from which he had fully recovered without permanent residuals as of June 30, 1975, provide substantial evidence to support the administrative law judge's finding that claimant's disability subsequent to June 30, 1975 was not related to his work injury.<sup>4</sup> As claimant has failed to establish that the administrative law judge erred in crediting this evidence, we affirm his denial of disability compensation after that date. See *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), cert. denied, 440 U.S. 911 (1979); *Uglesich v. Stevedoring Services of America*, 24 BRBS 180, 183 (1991).<sup>5</sup>

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<sup>3</sup>Although claimant correctly asserts that Dr. Lance did not explicitly diagnose a congenital defect, the administrative law judge reasonably inferred from Dr. Lance's diagnosis of sacralization, which he described as a fairly frequent variation of normal, that Dr. Lance had diagnosed a congenital defect. RX. J. at 452; Decision and Order at 13.

<sup>4</sup>The administrative law judge also reasonably inferred that the nature of claimant's 1974 back injury was temporary from the fact that claimant experienced no back problems which necessitated treatment from the time of Dr. Lance's June 30, 1975, report until January 1979, at which time Dr. Pavel only diagnosed degenerative disc disease and sacralization. RX. E at 265; Decision and Order at 13. Although the administrative law judge's reliance on Dr. Cecelio's April 14, 1979, opinion, RX. J. at 387, to support his finding that the work injury was temporary appears to have been misplaced inasmuch as Dr. Cecelio's impression at the time of this examination was that claimant had a probable chronic unresolved lumbosacral sprain or possible disc disease, any error is harmless inasmuch as the medical opinion of Dr. Lance, in conjunction with Dr. Pavel's failure to diagnose any condition related to the work injury, provides substantial evidence to support the administrative law judge's finding that claimant had no work-related back disability after June 30, 1975.

<sup>5</sup>Our affirmance of the administrative law judge's determination that claimant is not entitled to additional disability compensation renders the arguments raised in employer's protective cross-appeal moot. We note, however, that the administrative law judge's findings with regard to the

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doctrine of laches and the filing of the September 1975 claim are consistent with applicable law. *Intercounty Construction Corp. v. Walter*, 422 U.S. 1, 2 BRBS 3 (1975); *Ingalls Shipbuilding, Inc. v. Asbestos Health Claimants*, 17 F.3d 130, 28 BRBS 12 (CRT)(5th Cir. 1994); *Norton v. National Steel & Shipbuilding Co.*, 27 BRBS 33 (1993)(Brown, J., dissenting), *aff'g on recon. en banc* 25 BRBS 79 (1991).

Accordingly, the Decision and Order of the administrative law judge is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

ROY P. SMITH  
Administrative Appeals Judge

JAMES F. BROWN  
Administrative Appeals Judge