

BRB Nos. 06-0147
and 06-0509

ALANE JOY LEE)	
(Widow of THOMAS E. LEE))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
BATH IRON WORKS CORPORATION)	DATE ISSUED: 07/30/2007
)	
and)	
)	
ONEBEACON INSURANCE)	
)	
Employer/Carrier-)	ORDER on MOTION
Respondents)	for RECONSIDERATION

Employer has filed a timely motion for reconsideration of the Board's decision in the captioned case, *Lee v. Bath Iron Works Corp.*, BRB Nos. 06-0147, 06-0509 (Feb. 28, 2007)(unpub.). 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407, 802.409.

To reiterate the facts of this case relevant to employer's motion for reconsideration, claimant filed claims for benefits under the Act on the basis of injuries allegedly sustained by both her and her husband while in the course of their respective employment with employer. Specifically, claimant sought death benefits on the basis that her husband's death from pancreatic cancer in 1982 was due to alleged work-related radiation and lead exposure and disability benefits for herself on the basis that her alleged psychiatric and respiratory conditions arose out of her own employment with employer. Employer moved for summary decision, requesting that the claims be denied as untimely filed pursuant to Section 13(a) of the Act, 33 U.S.C. §913(a). In support of its motion for summary decision, employer asserted that claimant developed a subjective perception of potential claims under the Act no later than October 11, 2000,¹ that claimant notified the Office of Workers' Compensation Programs of her claims on September 8, 2004, and that employer's failure to file a first report of injury does not toll the statute of limitations

¹ The October 11, 2000, date of awareness referred to by employer is based on claimant's letter of that date to employer's claims manager.

pursuant to Section 30(f) of the Act, 33 U.S.C. §930(f), since employer had no knowledge of an alleged work-related injury until after the limitations period had expired. The administrative law judge granted employer's motion for summary decision and denied the claims as untimely filed, finding that in October 2000, claimant was aware of the relationship between decedent's injury/death and his employment with employer and of the relationship between her injury and her employment with employer, that the claims for death and disability benefits were not filed until September 8, 2004, and that the tolling provisions of Section 30(f) of the Act do not apply.²

On appeal, the Board affirmed the administrative law judge's finding that claimant's date of awareness was October 2000, but held that the administrative law judge did not apply the correct legal standards in addressing whether the statute of limitations was tolled by Section 30(f) of the Act. *Lee*, slip op at 7-11. Specifically, the Board held that the administrative law judge erroneously relied on the length of time that had elapsed since the alleged injuries in finding that the Section 30(f) tolling provision is inapplicable,. In this regard, the Board stated that the relevant issue with respect to the applicability of Section 30(f) is whether employer received notice or gained knowledge of the alleged injuries during the relevant filing period, *i.e.*, after claimant became aware of the relationship between decedent's death and her disability and the employment. *Id.* The Board therefore vacated the administrative law judge's finding that Section 30(f) is inapplicable to the instant claim, and remanded the case for the administrative law judge to consider whether employer gained knowledge for purposes of Section 30(a) of the Act, 33 U.S.C. §930(a), during the statutory filing period after claimant's October 2000 date of awareness. *Id.* at 9-10. If, on remand, the administrative law judge finds that claimant's correspondence with employer provided employer with knowledge for purposes of Section 30(a), the Board stated that the relevant limitations periods would be tolled by Section 30(f) until an injury report was filed by employer.³ *Id.* at 10-11. Lastly, the Board stated that:

[i]f the evidence presented by the parties with respect to employer's Motion for Summary Decision is insufficient for a resolution of the Section 30(f) issue, the administrative law judge must hold an evidentiary hearing on the issue of the timeliness of claimant's claim and on any other issues raised by the parties. 33 U.S.C. §919(d); 20 C.F.R. §702.331 *et seq.*; *see Morgan [v.*

² Thereafter, the administrative law judge denied claimant's requests for reconsideration and for modification pursuant to Section 22 of the Act, 33 U.S.C. §922.

³ In its motion for reconsideration, employer acknowledges that it did not file Section 30(a) reports for the alleged injuries. *See Employer's Motion for Reconsideration* at 3 (no.8).

Cascade General, Inc., 40 BRBS 9, 13 (2006)]; *Dunn v. Lockheed Martin Corp.*, 33 BRBS 204 (1999).

Id. at 11. Accordingly, the Board vacated the administrative law judge's conclusion that the claims were not timely filed and remanded the case for further consideration.

In its motion for reconsideration, employer requests that the Board reconsider its decision to affirm the administrative law judge's finding that claimant's date of awareness was October 2000. Specifically, while acknowledging the administrative law judge's statements that claimant was aware in October 2000 of the relationship between her and her husband's injuries and their employment with employer, employer contends that the administrative law judge did not make a specific finding that claimant's *initial* date of awareness was in October 2000. Employer therefore requests that the Board issue a decision affirming the administrative law judge's denial of the claims as untimely or, in the alternative, that the Board amend its decision to delete the holding that claimant's date of awareness was in October 2000 and to permit the administrative law judge on remand to clarify his findings on that issue.

With respect to claimant's date of awareness, the administrative law judge found that the "undisputed facts" establish that claimant was aware in October 2000 of the relationship between the alleged injuries which formed the basis for the instant claims and the parties' employment with employer.⁴ *See* Decision and Order Granting Summary Decision at 3. On reconsideration, the administrative law judge found that the documents submitted by claimant supported his original finding that claimant was aware of the causal relationship between the injuries and the employment "as early as October 2000." *See* Order on Reconsideration at 1-2; Decision and Order Denying Modification at 3. It was employer's action in filing its motion for summary decision that led to the administrative law judge's reliance on October 2000 as claimant's date of awareness. Specifically, employer asserted in its motion for summary decision that claimant developed a subjective awareness of potential claims no later than October 11, 2000, and did not present argument or evidence to the administrative law judge in support of a specific date of awareness earlier than October 2000. Thereafter, in determining whether to grant employer's motion for summary decision, the administrative law judge was required to determine, viewing the evidence in the light most favorable to claimant, the

⁴ The administrative law judge's findings regarding the "undisputed facts" were made on the basis of the evidence submitted by employer in support of its motion for summary decision and the evidence submitted by claimant in opposition to that motion. In the administrative law judge's subsequent two decisions, he also considered the evidence submitted by claimant in support of her requests for reconsideration and modification.

non-moving party, whether there were any genuine issues of material fact and whether employer was entitled to summary judgment as a matter of law. *See generally Han v. Mobil Oil Corp.*, 73 F.3d 872 (9th Cir. 1995). Moreover, the administrative law judge was required to draw all inferences in favor of claimant as the non-moving party. *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors*, 809 F.2d 626 (9th Cir. 1987); *see also O'Hara v. Weeks Marine*, 294 F.3d 55, 61 (2^d Cir. 2002). In considering the issue of the timeliness of the instant claims, the administrative law judge was required to determine the date of claimant's awareness, and the undisputed evidence before him could not support an earlier date of awareness. Had the administrative law judge found that the evidence presented an issue of fact with respect to claimant's date of awareness, employer would not have been entitled to the summary decision which it sought. Thus, based on the posture of the case before him, the administrative law judge properly considered October 2000 to be claimant's date of awareness.

Nonetheless, as this case is remanded for further findings by the administrative law judge, the administrative law judge may within his discretionary authority additionally reconsider the date of claimant's awareness of a relationship between the injuries alleged and claimant's and decedent's employment with employer. Moreover, in light of the possibility noted in the Board's decision that resolution of the Section 30(f) issue by the administrative law judge on remand may require that an evidentiary hearing be held, we hereby modify that decision to acknowledge that the administrative law judge may also receive additional evidence on the issue of claimant's date of awareness.⁵

⁵ Although employer requests that the Board, on reconsideration, affirm the administrative law judge's denial of the claims as untimely filed, employer offers no rationale that could support such an affirmance; such request is therefore denied.

Accordingly, we grant employer's motion for reconsideration, and modify the Board's original decision to reflect that the administrative law judge may on remand reconsider the issue of claimant's date of awareness. 20 C.F.R. §802.409. In all other respects, the Board's decision in this case is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge