BRB No. 05-0586

HOWARD SINGER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
KINDER MORGAN, INCORPORATED	)	DATE ISSUED: 03/28/2007
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Respondents	)	ORDER on MOTION FOR RECONSIDERATION

Employer has filed a timely motion for reconsideration of the Board's decision in this case, *Singer v. Kinder Morgan, Inc.*, BRB No. 05-0586 (April 6, 2006) (unpub.). 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407. Employer alleges that the Board erred in vacating the administrative law judge's finding that employer was prejudiced by claimant's failure to provide timely written notice, pursuant to Section 12(d)(2) of the Act, 33 U.S.C. §912(d)(2).

To recapitulate, claimant sustained a left knee injury which he alleged was due either directly to his work for employer which ended on or about September 7, 2001, or, alternatively, due to the favoring of his left knee following surgery on September 11, 2001, for a work-related injury to his right knee, *i.e.*, a right total knee arthroplasty performed by Dr. Hajj. Pertinent to the motion for reconsideration, the administrative law judge found that claimant did not provide timely notice of his left knee injury as required by Section 12(a), and that this failure was not excused pursuant to any provision

of Section 12(d), 33 U.S.C. §912(d). He thus denied claimant's claim for disability benefits related to his left knee injury.[1]

The Board vacated the administrative law judge's finding that employer was prejudiced by claimant's lack of timely written notice, as the administrative law judge did not discuss relevant evidence suggesting that employer was able to investigate the claim in a timely manner. *Singer*, slip op. at 7. The Board thus vacated the administrative law judge's finding that claimant's claim for disability benefits relating to his left knee injury is barred by Section 12 of the Act, and remanded the case for further consideration. *Id.*

Given the disjunctive nature of Section 12(d), the facts, as argued herein by employer, that it was prejudiced because claimant was never involved in any specific industrial incident while working for employer and that he never reported any left knee pain to employer or advised employer that he believed his left knee condition was work-related are insufficient to alter our prior decision to remand the case for reconsideration of whether employer proved it was prejudiced by late notice. Rather, those facts are more relevant to a determination as to whether employer had knowledge of the injury, an issue pertaining to Section 12(d)(1), and not Section 12(d)(2). *See* 33 U.S.C. §912(d)(1), (2). Similarly, employer's reliance on the Board's decisions in *Jackson v. Ingalls Shipbuilding*, 15 BRBS 299 (1983), *Kulick v. Continental Baking Corp.*, 19 BRBS 115 (1986), and *Addison v. Ryan-Walsh Stevedoring Co.*, 22 BRBS 32 (1989), is misplaced. First, the Board's decisions in *Kulick* and *Jackson* involved applications of Section 12(d) as it existed prior to the 1984 Amendments,[2] and each turned on whether employer had either actual or imputed knowledge of claimant's injury.[3] As such, neither decision

[1]The administrative law judge, however, found that employer is liable for all reasonable and necessary medical expenses stemming from claimant's work-related left knee injury.

[2]Under Section 12(d) as it existed prior to the 1984 Amendments, claimant's failure to comply with Section 12(a) could be excused if: (1) claimant established that employer had knowledge of the injury or death during the filing period *and* that employer was not prejudiced by claimant's failure to file timely notice, or (2) if the failure was excused. (emphasis added). 33 U.S.C. §912(d) (1982) (amended 1984). *Jackson*, obviously, was decided prior to the enactment of the 1984 amendments and *Kulick* was a case which arose under the 1928 D.C. Workmen's Compensation Act. *Keener v. Washington Metropolitan Area Transit Authority*, 800 F.2d 1173 (D.C. Cir. 1986), *cert. denied*, 480 U.S. 918 (1987); *Pryor v. James McHugh Construction Co.*, 27 BRBS 47 (1993).

[3]Employer's brief on reconsideration presents these cases, much like it presents its supporting facts, in terms more appropriately left for issues pertaining to Section 12(d)(1)

addressed the central issue of this case, *i.e.*, whether employer was prejudiced by the lack of prior written notice. As for *Addison*, 22 BRBS 32, the Board affirmed, as supported by substantial evidence, an administrative law judge's finding that employer was prejudiced by claimant's delay in notification of a back injury in an accident because it was unable to determine what immediate back trauma claimant suffered due to the fall and the extent, if any, to which that trauma contributed to claimant's present disability. In the instant case, however, the Board vacated the administrative law judge's initial finding that employer was prejudiced and remanded the case because the record contains relevant evidence, not fully considered by the administrative law judge, that employer was able to effectively investigate claimant's claim that his left knee condition is related to his work for employer. *See Sheek v. General Dynamics Corp.*, 18 BRBS 151 (1986), *modifying* 18 BRBS 1 (1985) (remand may be necessary if prejudice is not considered or inadequate findings are made).

For the aforesaid reasons, we reject employer's assertions on reconsideration, and reiterate our prior holding in this case. Specifically, the administrative law judge's finding that employer was prejudiced by claimant's failure to provide timely written notice and thus that claimant's claim for disability benefits, based on his theory that his left knee condition is due to his work for employer, is barred by Section 12 of the Act is vacated, and the case is remanded for further consideration.

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knowledge. In this regard, employer asserts that "if knowledge could not be imputed to the employer under the facts of the *Addison* or *Kulick* matter, than (sic) knowledge certainly cannot be imputed to the employer under the facts of the present case." Employer's Brief at 6-7. Employer further adds that *Jackson* "is also illustrative" on this point. *Id.* at 7.

Accordingly, employer's motion for reconsideration is denied. 20 C.F.R. §802.409.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge