BRB No. 96-889

RICHARD NIELSEN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED:_____
WESTINGHOUSE ELECTRIC CORPORATION	)	
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits and the Denial of Claimant's Motion for Reconsideration of Alfred Lindeman, Administrative Law Judge, United States Department of Labor.

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

Frank B. Hugg, San Francisco, California, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits and the Denial of Claimant's Motion for Reconsideration (95-LHC-1652) of Administrative Law Judge Alfred Lindeman 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 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 worked for employer as a design engineer on its Trident missile program. He suffered a work-related myocardial infarction in 1983 but, after a three-month recuperative absence, returned to his usual work.[1] In June 1989, claimant began having arrhythmias (irregular heartbeats) and, because they were potentially life-threatening, his doctor advised him to stop working. Cl. Ex. 5. Claimant retired on September 19, 1989. Tr. at 51, 53. Thereafter, he filed a state claim for workers' compensation benefits and a claim under the Act for permanent total disability benefits. Emp. Exs. 7-8.

The administrative law judge found that claimant sustained a new injury in 1989 and not, as claimant argued, a natural progression of the condition resulting from his 1983 heart attack. Decision and Order at 5. He also found that claimant has been permanently totally disabled since the day he retired. *Id.* at 3. However, the administrative law judge concluded that claimant did not meet the Section 2(3) status or the Section 3(a) situs requirements of the Act at the time of his 1989 injury. 33 U.S.C. §§902(3), 903(a); Decision and Order at 5-6. Consequently, he denied benefits. Claimant moved for reconsideration of the administrative law judge's decision, requesting reconsideration of the finding that a new injury occurred in 1989.[2] The administrative law judge denied reconsideration because he found that claimant's failure to seek reconsideration of the status and situs findings made his other arguments superfluous.[3] Decision and Order on Recon. at 1. Claimant

[1]Claimant filed a workers' compensation claim under state law for this injury. The case was later settled. Emp. Ex. 6.

[2]Claimant also sought reconsideration of the administrative law judge's conclusion that he was not underpaid for his 1983 injury. The administrative law judge determined that, although claimant's entitlement under the Act is greater than that which he received under the state law, the settlement reached by the parties more than covered the initial short-fall of benefits. Decision and Order at 6 n.3. In denying reconsideration of this issue, the administrative law judge merely referred claimant to his initial decision. Claimant did not raise this issue on appeal.

[3]Had claimant prevailed on his natural progression argument, the administrative law judge's determinations concerning claimant's status and situs as of the occurrence of the 1989 symptoms would have been ineffective. Thus, it was improper for the administrative law judge to deny reconsideration because of claimant's failure to specifically request reconsideration of the coverage issue. However, such error is harmless in light of our decision herein.

appeals these decisions, and employer responds, urging affirmance.[4]

[4]Employer also renews its motion to dismiss the appeal for claimant's failure to file a timely Petition for Review and brief. We deny employer's renewed motion. Claimant filed a timely response to an order to show cause and requested that the Board accept his petition for review and brief. The Board accepted the response, the petition, and the brief as part of record, and it denied employer's motion to dismiss in an Order dated July 9, 1996. 20 C.F.R. §§801.301, 802.219.

Claimant initially contends the administrative law judge raised a new issue, *sua sponte*, in his decision when he discussed whether claimant's 1989 symptoms constituted a new injury, as that issue was not raised by the parties. Claimant's contention is not persuasive. Claimant presented this case as one which involves the "natural progression and result of damage" due to the 1983 heart attack; however, he sought benefits based on his average weekly wage in 1989.[5] Tr. at 7-9. Employer's opening arguments identified the "injury" as an issue to be resolved by the administrative law judge. It asserted there is no causal connection between the 1983 injury and the 1989 symptoms, and in the alternative it sought "second injury" relief pursuant to Section 8(f), 33 U.S.C. §908(f). Emp. Ex. 9; Tr. at 12-16. Employer also noted that the parties had referred to the 1989 symptoms by several designations during the course of the pre-trial proceedings.[6] Moreover, we find it unreasonable for claimant to presume that his injury is the natural progression of his 1983 heart attack merely because he labels it so. The administrative law judge clearly considered the matter of a new injury raised when, in questioning one of employer's defenses, he stated that the defense would apply only if claimant's

> theory that what occurred in '89 was a natural progression of the '83 situation without a new injury occurring, would it not? In other words, if the evidence were to show that the stimuli between '83 and '89 were sufficient to aggravate the pre-existing conditions such as to constitute a new injury [under] the Act [the defense would be invalid].

Tr. at 12-13. For these reasons, we reject claimant's contention that the administrative law judge raised a new issue without notifying the parties. The issue of whether claimant sustained a new injury in 1989 or whether he suffered effects of the natural progression of the condition caused by his 1983 myocardial infarction was clearly before the administrative law judge.

Claimant also contends his 1989 irregular heartbeat was not a new injury but was the result of the natural progression of the 1983 work-related myocardial

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[5]Claimant also argued he is totally disabled as a result of the "natural progression of arterial sclerosis. . . ." Tr. at 7. He subsequently withdrew this claim. Cl's brief at 4.

[6]According to employer, the 1989 symptoms had been referred to as "the cumulative injury," an aggravation, the natural progression, or a new injury. Tr. at 15.

infarction. Generally, an employer is liable for the entire disability if a claimant sustains a second injury which is the natural or unavoidable result of the first injury. *See generally Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991). In this case, the evidence supports the administrative law judge's determination that claimant's 1989 arrhythmias were not the result of the natural progression of his 1983 injury but were instead "a new injury" within the meaning of the Act. 33 U.S.C. §902(2); *Crum v. General Adjustment Bureau*, 12 BRBS 458 (1980), *aff'd in pertinent part*, 738 F.2d 474, 16 BRBS 115 (CRT) (D.C. Cir. 1984); Decision and Order at 5. According to the record, claimant was generally asymptomatic between 1984 and 1989 and did not undergo treatment for his heart condition until 1989. Cl. Ex. 3; Brown Dep. at 18-19; Tr. at 33. However, claimant testified that between 1984 and 1989 his work was very stressful because of imminent deadlines, conflicts with supervisors and contractors, and required travel. Tr. at 38-49. Dr. Blau, Board-certified in internal medicine, stated that claimant's 1989 symptoms were caused by a combination of work and personal stresses. Cl. Ex. 1; Tr. at 76, 81, 97. Dr. Heyer, claimant's treating physician, stated that claimant's cardiac condition was aggravated by his work stresses and she recommended retirement. Cl. Ex. 5. As the evidence supports the administrative law judge's conclusion that claimant's stress at work caused a new injury in 1989, we affirm his conclusion. *See Crum*, 12 BRBS at 460-461.

Claimant also contends the administrative law judge improperly rejected the parties' stipulation regarding coverage without notifying them that he would do so. Consequently, he contends the administrative law judge violated his due process rights by not giving him a chance to present evidence on the issue. An administrative law judge may not reject stipulations without notifying the parties and explaining his reasons. *Dodd v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 245 (1989); *Grimes v. Exxon Co., U.S.A.*, 14 BRBS 573 (1981). However, stipulations are not binding on the parties until they are received into evidence. *Warren v. National Steel & Shipbuilding Co.*, 21 BRBS 149 (1988).

Contrary to claimant's contentions, the record does not demonstrate the existence of an agreement between the parties as to whether claimant was covered by the Act when he was injured in 1989.[7] First, we note that claimant, in his pre-hearing statement, indicated there were no resolved issues between the parties. Additionally, in its pre-hearing statement as well as its opening arguments, employer

[7]The parties stipulated that the status and situs requirements were met as to the 1983 myocardial infarction. Had the 1989 symptoms been the natural result of claimant's cardiac condition caused by his 1983 injury, they would have been covered under the earlier stipulation. *See generally Donnell v. Bath Iron Works Corp.*, 22 BRBS 136 (1989).

raised the issue of whether claimant met the status and situs requirements in 1989. Further, employer's cross-examination of claimant consisted almost entirely of questions regarding claimant's duties and where he worked. Employer also called claimant's supervisor as a witness to answer the same types of questions. Tr. at 165 *et seq.* Therefore, we reject claimant's assertion that the parties stipulated to coverage of the 1989 injury. Because there was no stipulation regarding coverage of the 1989 injury and because employer raised the issue as a defense against the claim, the administrative law judge properly considered the issue without giving special notice thereof to the parties. *See Warren*, 21 BRBS at 151-152; 20 C.F.R. §702.338.

For a claim to be covered by the Act, a claimant must establish that his injury occurred upon the navigable waters of the United States, or that his injury occurred on an enumerated site or other adjoining area covered by Section 3(a), and that his work is maritime in nature and is not specifically excluded by the Act. 33 U.S.C. §§902(3), 903(a); *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 15 BRBS 62 (CRT) (1983); *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 11 BRBS 320 (1979); *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977). Thus, in order to demonstrate that jurisdiction exists, a claimant must satisfy the "situs" and the "status" requirements of the Act. *Id.*; *Crapanzano v. Rice Mohawk Construction Co., Ltd.*, 30 BRBS 81 (1996).

In this case, the facts affecting coverage, which were elicited at the hearing, are not in dispute. Claimant testified that he did not work over navigable waters in 1989, and his supervisor confirmed that the vast majority of claimant's employment between 1983 and 1989 was spent in an office in a converted high school in a residential area. Tr. at 177, 197. This office is not a covered situs. *Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137, 7 BRBS 409 (9th Cir. 1978). Claimant also testified that his 1989 arrhythmias first occurred while he was either jogging or while he was attending a course on grounding circuits. The next time he noticed the symptoms, he was watching television. Tr. at 49, 188. The administrative law judge found that none of these instances occurred while claimant was working on a covered situs. Thus, although claimant contends he was not permitted to present evidence concerning coverage under the Act, the pertinent evidence is of record. Consequently, the administrative law judge's conclusion that claimant was not injured on a covered situs is affirmed.[8] *Anastasio v. A.G. Ship Maintenance*, 24

[8]In light of our decision herein, we need not address whether claimant's employment fulfilled the status requirement.

BRBS 6 (1990); *Lasofsky v. Arthur J. Tickle Engineering Works, Inc.*, 20 BRBS 58 (1987), *aff'd mem.*, 853 F.2d 919 (3d Cir. 1988).

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

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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JAMES F. BROWN
Administrative Appeals Judge

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NANCY S. DOLDER
Administrative Appeals Judge