BRB No. 05-0512

VICKI MORGAN (Widow of DENNIS MORGAN)	)	
Claimant-Petitioner	)	
v.	)	
CASCADE GENERAL, INCORPORATED	)	DATE ISSUED: 03/08/2006
and	)	
LIBERTY NORTHWEST INSURANCE GROUP	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Order Granting Summary Dismissal of Claim for Death Benefits of William Dorsey, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

John Dudrey (Williams Fredrickson, LLC), Portland, Oregon, for employer/carrier.

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Order Granting Summary Dismissal of Claim for Death Benefits (2004-LHC-01656) of Administrative Law Judge William Dorsey 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, the widow of the deceased employee, appeals a denial of death benefits. The employee sustained a knee injury in the course of his employment on April 5, 2000. Employer paid the employee temporary total disability benefits and permanent partial disability benefits for a 10 percent leg impairment under the schedule. The last payment was made in July 2001. On April 10, 2002, the employee died in a car crash caused by his own inebriation. On June 6, 2003, claimant filed a claim for death benefits under the Act, contending that the employee's death was due to his drinking due to depression resulting from the knee injury.[1] Employer contended that the claim was untimely filed pursuant to Section 13(a) of the Act, 33 U.S.C. §913(a), as claimant had knowledge of the alleged work-relatedness of the employee's death at the time of death, but did not file a claim for more than one year thereafter.

Employer filed with the administrative law judge a motion for summary decision, contending that no issue of material fact remained as to the date claimant was aware of the work-relatedness of her husband's death. Employer filed with its motion portions of claimant's deposition stating that she was not surprised when she was told how her husband had died, as he had been drinking a lot due to "depression." Employer alleged this depressed condition was due to the work injury. As claimant did not file a claim within one year of the death, employer stated it was entitled to summary decision. Employer also averred, by way of an affidavit of one of its employees, that it did not gain knowledge of an alleged work-related death until the claim was filed in June 2003 and for that reason its failure to file a Section 30(a) report earlier did not toll the statute of limitations. *See* 33 U.S.C. §930(a), (f).

Claimant opposed the motion for summary decision on the ground that issues of fact remained, which required a hearing. She supported her contention with her affidavit stating that her deposition testimony was that, in hindsight, it was clear to her that there was a relationship between the drinking and the knee injury, but that she did not have the requisite awareness at the time of death. Claimant also alleged that the two-year statute of limitations of Section 13(b)(2), 33 U.S.C. §913(b)(2), should apply to a claim based on "alcoholism," since it is an "occupational disease." Employer contended in reply that claimant was belatedly raising a claim based on alcoholism, and that, in any event, the occupational disease statute of limitations is inapplicable.

The administrative law judge granted employer's motion for summary decision. He first found that the claim for death benefits was based on an automobile accident,

[1] Claimant also pursued additional temporary total disability benefits up to the date of death. That claim remains pending. The Board issued an Order on June 3, 2005, denying employer's motion to dismiss claimant's appeal of the denial of death benefits as interlocutory, stating that the order denying the death benefits claim was a final order.

which is a traumatic event and that therefore the one-year statute of limitations of Section 13(a) applies. To the extent that claimant claimed she was "in shock" after her husband's death and unable to act, the administrative law judge addressed Section 13(c) of the Act, 33 U.S.C. §913(c),[2] and found that claimant was not "mentally incompetent" after the death of her husband. The administrative law judge also found that claimant was aware of the work-relatedness of her husband's death essentially at the time of death, based on her deposition testimony, and, as claimant's claim was filed more than one year after April 10, 2002, he dismissed the claim as untimely filed. Claimant appeals the grant of summary decision finding her claim is time-barred.[3] Employer filed a response brief in support of the administrative law judge's decision, to which claimant replied.

Section 13(a) requires that a claim for death benefits be filed within one year after the death of the employee. The time for filing does not begin until the claimant is "aware, or by the exercise of reasonable diligence should have been aware, of the relationship between" the death and the employment. In a claim based on an occupational disease "which does not immediately result in death," a claim for compensation "shall be timely if filed within two years after the employee or claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, . . . and the death . . . ." 33 U.S.C. §913(b)(2). Section 20(b) of the Act, 33 U.S.C. §920(b), provides a presumption that a claim was timely filed, "in the absence of substantial evidence to the contrary." *See Stark v. Washington Star Co.*, 833 F.2d 1025, 20 BRBS 40(CRT) (D.C. Cir. 1987).

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[2] Section 13(c) states:

> If a person who is entitled to compensation under this chapter is mentally incompetent . . ., the provisions of subdivision (a) of this section shall not be applicable so long as such person has no guardian or other authorized representative, but shall be applicable in the case of a person who is mentally incompetent . . . from the date of appointment of such guardian or other representative, . . .

Claimant did not contend that this section was applicable.

[3] Claimant filed a motion for reconsideration, stating that the administrative law judge did not address whether her claim for funeral expenses also was time-barred. The administrative law judge found the claim for funeral expenses barred, and, on appeal, claimant does not contend this finding is in error.

Under the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges, any party may move, with or without supporting affidavits, for summary decision at least twenty days before the hearing. 29 C.F.R. §18.40(a). Any party opposing the motion may serve opposing affidavits or countermove for a summary decision. *Id.* When a motion for summary decision is supported by affidavits, "a party opposing the motion may not rest upon the mere allegations or denials of such pleading. Such response must set forth specific facts showing that there is a genuine issue of fact for the hearing." 29 C.F.R. §18.40(c). If the pleadings, affidavits, material obtained through discovery or otherwise, or matters officially noticed show that there is no genuine issue of material fact, the administrative law judge may enter summary decision. 29 C.F.R. §§18.40(d), 18.41(a).

In determining whether to grant a motion for summary decision, the fact-finder must determine, viewing the evidence in the light most favorable to the non-moving party, whether there are any genuine issues of material fact and whether the moving party is entitled to summary judgment as a matter of law. *See generally Han v. Mobil Oil Corp.,* 73 F.3d 872 (9th Cir. 1995). In addition, the trier-of-fact must draw all inferences in favor of the non-moving party. *T.W. Elec. Service, Inc. v. Pacific Elec. Contractors***,** 809 F.2d 626 (9th Cir. 1987); *see also O'Hara v. Weeks Marine,* 294 F.3d 55, 61 (2d Cir. 2002). If a rational trier-of-fact might resolve the issue in favor of the non-moving party, summary decision must be denied. *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986). To defeat a motion for summary judgment, the party opposing the motion must establish the existence of an issue of fact that is both material and genuine. A "material fact is one that is relevant to an element of a claim or defense and whose existence might affect the outcome of the suit. The materiality of a fact is thus determined by the substantive law governing the claim or defense." *T.W. Elec. Service,* 809 F.2d at 630**.** The genuineness of the issue of fact cannot be shown merely by statements of the non-moving party that it will discredit the moving party's evidence at trial. Rather, that party must produce at least some "significant probative evidence tending to support" her claim. *First Nat'l Bank v. Cities Serv. Co.,* 391 U.S. 253, 290 (1968).

Claimant first contends that employer did not rebut the Section 20(b) presumption because employer failed to establish it did not gain knowledge of the employee's work-related death before June 6, 2003. Claimant contends, therefore, that Section 30(f) tolls the statute of limitations. Section 30(f) of the Act states:

> Where the employer or the carrier has been given notice, . . . of [the] death of any employee and fails, neglects, or refuses to file report thereof as required by the provisions of subdivision (a) of this section, the limitations in subdivision (a) of section 913 of this title shall not begin to run against

> the claim . . . until such report shall have been furnished as required by the provisions of subdivision (a) of this section.

Employer must establish it complied with Section 30(a) in order to rebut the Section 20(b) presumption. *See, e.g., Bustillo v. Southwest Marine, Inc*., 33 BRBS 15 (1999). But employer is not required to file a Section 30(a) report until it is aware of the work-relatedness of the injury or death. *Stark*, 833 F.2d 1025, 20 BRBS 40(CRT).

In this case, employer filed in support of its motion for summary decision an affidavit of one of its employees concerning when employer gained knowledge of the allegation that the death was work-related. Claimant's brief in opposition failed to address this issue in any manner, and the administrative law judge noted that claimant did not challenge employer's assertions. Decision and Order at 2. Claimant, therefore, failed to raise a genuine issue of material fact on this point, 29 C.F.R. §18.40(c), and cannot raise this contention for the first time on appeal. *See Buck v. General Dynamics Corp.*, 37 BRBS 53 (2003); *Turk v. Eastern Shore Railroad, Inc*., 34 BRBS 27 (2000). Therefore, we decline to address claimant's contentions concerning tolling pursuant to Section 30(a), (f).

Claimant next contends that the two-year statute of limitations for occupational diseases applies because alcoholism is an "occupational disease." This is a question of law, and if the administrative law judge applied the law incorrectly, his decision to grant summary decision cannot stand. *See Han*, 73 F.3d 872. The administrative law judge found that the employee's alcohol consumption caused a traumatic death in a car crash and that therefore the one-year limitations period applies. The administrative law judge also found that there is no evidence that the employee's alleged depression and his drinking were "peculiar hazards" of his employment such that they could be characterized as occupational diseases.[4]

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[4] In *Port of Portland v. Director, OWCP [Ronne II]*, 192 F.3d 933, 33 BRBS 143(CRT) (9th Cir. 1999), *cert. denied*, 529 U.S. 1086 (2000), the Ninth Circuit, within whose jurisdiction this case arises, stated that an occupational disease is:

> "any disease arising out of exposure to harmful conditions of the employment, when those conditions are present in a peculiar or increased degree by comparison with employment generally." *Gencarelle v. General Dynamics Corp.*, 892 F.2d 173, 176 (2d Cir.1989) (citing 1B A. Larson, *The Law of Workmen's Compensation* § 41.00, at 7-353). Nearly every court that has considered whether an injury under the Act is an occupational disease has accepted this definition, and so do we. *See LeBlanc v. Cooper/T. Smith Stevedoring, Inc.*, 130 F.3d 157, 160 (5th Cir.1997); *Liberty Mut. Ins. Co. v. Commercial Union Ins. Co.*, 978 F.2d 750, 752 n. 2

We need not decide whether depression and alcoholism are "occupational diseases" within the meaning of the Act. Assuming, *arguendo*, that they are "occupational diseases," the extended statute of limitations applies only to an occupational disease which "does not immediately result in death." In this case, the administrative law judge properly found that the car crash that claimed the employee's life was a traumatic event. Therefore, regardless of the underlying cause, there was an immediate death, which precludes application of the extended statute of limitations. *See generally Bath Iron Works Corp. v. Director, OWCP*, 506 U.S. 153, 26 BRBS 151(CRT) (1993).

Claimant also contends that the grant of summary decision was improper because there exists a genuine issue of material fact regarding when she was "aware" of the relationship between her husband's death and his employment. Employer supported its motion for summary decision with portions of claimant's deposition taken on December 9, 2004. Claimant stated she believed that at the end of his life her husband was "extremely depressed." Dep. at 49. Immediately following that statement, it appears that employer's lawyer tried to relate the employee's depression to the termination of the light-duty program at employer's facility. However, the next few pages of the deposition were not appended. Claimant also stated she was not surprised that her husband had died in a car crash due to his own drinking, because he had been drinking and driving quite a bit. *Id.* at 57, 59. Employer's motion thus averred that as of the date of death, claimant had linked in her own mind the knee injury that caused the employee's loss of employment, his depression and his drinking problem. Employer alleged that claimant's claim was time-barred, as she did not file a claim within one year of the date of death.

To her motion opposing summary decision relevant to her "awareness," claimant attached her own affidavit dated January 20, 2005, in which she stated that after her husband's death, she "was in a state of shock for at least several months and was a mess emotionally." She stated it took her several months before she could rationally attend to business affairs and before she could think about any relationship between the knee

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> (1st Cir.1992); *Gencarelle*, 892 F.2d at 176. The definition also comports with the generally accepted definition of "occupational" as "of, relating to, or caused by engagement in a *particular* occupation." *Webster's II New College Dictionary* (1995) (emphasis added). Thus, the disability must arise from conditions peculiar to the claimant's employment or particular line of work.

Ronne II, 192 F.3d at 939-940, 33 BRBS at 147-148(CRT). *See also* 33 U.S.C. §902(2) ("The term 'injury' means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury . . . .").

injury and the drinking/death. She stated that her deposition testimony was that with hindsight she was not surprised that he had died due to his drinking due to depression resulting from the knee injury/loss of employment.

The administrative law judge found, based on claimant's deposition testimony, that as of the date of death there was no material issue of fact concerning claimant's awareness of the relationship between the death and the employment. As further evidence of her awareness, the administrative law judge also noted that, within one year of the death, claimant had contacted employer about disability benefits allegedly due the employee and the distribution of funds in his pension plan. As claimant was "aware" more than one year before she filed her claim, the administrative law judge found the claim time-barred.

On appeal, claimant contends that she sufficiently put forth before the administrative law judge the existence of a material question of fact concerning her date of awareness. One cannot defeat a motion for summary decision merely by denying the assertions of the moving party. *Buck*, 37 BRBS at 55. In this case, however, claimant countered the deposition with her affidavit and alleged that the deposition never clearly established her awareness of the relationship between the work injury and the death. *See* 29 C.F.R. §18.40(c). She contends she raised an issue of fact such that summary decision was not proper.

We agree with claimant that the administrative law judge erred in granting employer's motion for summary decision. We hold that claimant raised the existence of a genuine issue of material fact by supplying her affidavit stating that she was unaware for several months after the death of the relationship between all the events and the work injury. *Harris v. Todd Pacific Shipyards Corp.*, 28 BRBS 254 (1994), *aff'd and modified on recon. en banc*, 30 BRBS 5 (1996) (Brown and McGranery, JJ., concurring and dissenting); 29 C.F.R. §18.41(b). The affidavit is "significant probative evidence tending to support" claimant's allegation that her claim was timely filed, *First Nat'l Bank*, 391 U.S. at 290, and "sets forth specific facts showing there is a genuine issue of fact for the hearing." 29 C.F.R. §18.40(c). The administrative law judge addressed claimant's affidavit only in terms of Section 13(c), and not in terms of claimant's date of awareness. Moreover, because the deposition testimony and the affidavit arguably are contrary to each other, the administrative law judge has to determine which is entitled to greater weight. When it is necessary to weigh opposing evidence or to make credibility determinations, it is error as a matter of law to grant summary decision. *Matsushita Electric Industrial Co.*, 475 U.S. at 587; *Han*, 73 F.3d at 875. In addition, the administrative law judge did not draw all inferences in claimant's favor, as was required. *Leslie v. Grupo ICA*, 198 F.3d 1152 (9th Cir. 1999); *see also Brockington v. Certified Electric, Inc.*, 903 F.2d 1523 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991). Rather, the administrative law judge had to infer that claimant has the requisite awareness

as *employer* suggested: (1) the employee had a knee injury that *apparently* kept him from working, (2) leading to depression and drinking, and (3) claimant knew he was depressed and drinking due to the knee injury such that his death due to an alcohol-related car crash was related to the knee injury. While the administrative law judge is entitled to draw his own inferences and conclusions from the evidence of record, *see, e.g.*, *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 30(CRT) (9th Cir. 1988), he may not draw inferences in favor of the party moving for summary decision. *McLaughlin v. Liu*, 849 F.2d 1205 (9th Cir. 1988).

Therefore, we vacate the administrative law judge's grant of employer's motion for summary decision. *Dunn v. Lockheed Martin Corp.*, 33 BRBS 204 (1999); *Green v. Ingalls Shipbuilding, Inc.*, 29 BRBS 81 (1995); *Harris*, 28 BRBS 254. We remand the case for 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.*

Accordingly, the administrative law judge's Order Granting Summary Dismissal of Claim for Death Benefits is vacated. The case is remanded for an evidentiary hearing.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge