BRB No. 09-0659

KARL DAHL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SPEARIN, PRESTON & BURROWS, INCORPORATED	)	DATE ISSUED: 05/21/2010
	)	
and	)	
	)	
RELIANCE INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

Keith L. Flicker and Brendan E. McKeon (Flicker, Garelick & Associates, LLP), New York, New York, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2008-LHC-00655) of Administrative Law Judge Adele Higgins Odegard 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, who worked for over 38 years with various employers as a dock builder, filed a claim under the Act against employer on November 16, 2004, seeking permanent total disability benefits for his alleged occupational lung diseases. Claimant initially alleged that his exposure to chemicals and noxious irritants while working between "July

thru August 2002" caused him to have asthma, bronchitis, emphysema and chronic obstructive pulmonary disease. Claimant, however, amended his claim on two occasions: on April 5, 2005, to reflect an additional injury of "asbestos-related pleural thickening" without any specific date of exposure; and on November 16, 2005, to reflect an injury of "asbestos-related restrictive lung disease" due to exposure to asbestos during dock repair work he performed between August 5, 1997, and September 5 1997, at "IMTT, Bayonne, NJ."

The administrative law judge found that claimant did not know the full nature and extent of his injury until his illness and hospitalization on April 12, 2003. She therefore found the claim filed in November 2004, and amended to include asbestos exposure in April 2005, timely pursuant to Section 13 of the Act, 33 U.S.C. §913. On the merits, the administrative law judge found claimant entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), with regard to his pulmonary/respiratory condition, and that employer could not establish rebuttal thereof. The administrative law judge nevertheless also found that the evidence, based on the record as a whole, establishes that claimant's pulmonary/respiratory condition, including his asbestos-related pleural abnormalities, is related to his work for employer. The administrative law judge thus concluded that claimant is entitled to total disability benefits from April 12, 2003, until he obtained suitable alternate work at Home Depot, and for the period of time from the end of his employment at Home Depot until the start of his employment as a school bus driver.[1] The administrative law judge rejected employer's assertion that claimant's claim is barred as a result of an alleged third-party settlement by virtue of 33 U.S.C. §933(g). The administrative law judge awarded claimant medical benefits for his work-related pulmonary condition, and for medical monitoring of his asbestos-related pleural abnormalities. 33 U.S.C. §907(a).

On appeal, employer challenges the administrative law judge's findings that claimant's claim was timely filed, and that it is not barred by Section 33(g). Additionally, employer challenges the administrative law judge's findings that claimant's pulmonary condition is related to his work for employer, that it is the responsible employer, and that claimant is disabled as a result of a work-related occupational disease. Claimant has not filed a response brief in this case.

[1] The administrative law judge also awarded claimant partial disability benefits for those periods during which he held suitable alternate employment. Additionally, the administrative law judge found that claimant attained maximum medical improvement with regard to his pulmonary condition as of September 6, 2005, the date of Dr. Kipen's evaluation.

Employer first argues that the administrative law judge erred in finding that claimant did not become aware of the relationship between his disease and disability until April 2003, and thus, in finding that claimant's November 16, 2004, claim was timely filed. Employer avers that claimant first became aware of his disability as a result of asbestos exposure on November 4, 2000, when Dr. Levine opined that claimant had pleural thickening "consistent with previous asbestos exposure indicating asbestos-related pleural disease." EX 3. Additionally, employer argues that claimant was "aware" prior to April 2003, as evidenced by his participation in formal asbestos litigation as early as June 11, 2001, or by his experiencing respiratory difficulties in 2002.[2]

Section 13(b)(2) of the Act provides that an occupational disease claim shall be timely if filed within two years after 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, the disease, and the . . . disability . . . ." 33 U.S.C. §913(b)(2). The regulations provide that the time limitations do not begin to run until the employee is disabled.[3] 20 C.F.R. §§702.212(b), 702.222(c); *see Love v. Owens-Corning Fiberglas Co.*, 27 BRBS 148, 150 (1993); *Lombardi v. General Dynamics Corp.*, 22 BRBS 323, 326 (1989); *Curit v. Bath Iron Works Corp.*, 22 BRBS 100, 102 (1988). In addition, pursuant to Section 20(b) of the Act, 33 U.S.C. §920(b), claimant is entitled to a presumption that his claim was timely filed. *See Stark v. Washington Star Co.*, 833 F.2d 1025, 20 BRBS 40(CRT) (D.C. Cir. 1987). Thus, employer must establish that the claim was filed more than two years after claimant's date of awareness of the relationship between his employment, disease and the disability. *See Blanding v. Director, OWCP*, 186 F.3d 232, 33 BRBS 114(CRT) (2d Cir. 1999).

[2] Employer avers that the administrative law judge did not consider the "Plaintiff's Initial Fact Sheet" dated June 13, 2001, wherein claimant listed his occupation and worksites, and "claimed asbestos-related diseases" and "pleural disease" with the date of diagnosis of "November 4, 2000." EX 3. Contrary to employer's argument, the administrative law judge explicitly considered this evidence in addressing the timeliness issue. Decision and Order at 14-15, 16, 17.

[3] Section 702.222(c) of the regulations, 20 C.F.R. §702.222(c), provides that in occupational disease cases, "the time limitation for filing a claim does not begin to run until the employee is disabled, or in the case of a retired employee, where a permanent impairment exists." *See Lindsay v. Bethlehem Steel Corp.*, 18 BRBS 20 (1986) (although claimant knew of asbestosis in 1976, awareness under amended statute did not occur until he was forced to stop work in July 1980; therefore, his August 1980 claim was timely filed).

The administrative law judge found that claimant may have been aware that he had "bilateral pleural thickening" related to asbestos exposure as early as November 2000, but that the earliest manifestation of any disability relating to claimant's asbestos exposure did not occur until April 12, 2003, when claimant was hospitalized with diagnoses of chronic obstructive pulmonary disease, emphysema and chronic bronchitis. Claimant testified that he did not sustain any actual disability related to his respiratory injuries until his April 12, 2003, hospitalization, and that thereafter Dr. Saliba restricted him from returning to work as a dock builder. HT at 17; 28-29. As substantial evidence supports the administrative law judge's finding that claimant was not disabled prior to April 12, 2003, we affirm the conclusion that this was the earliest date claimant could have been aware of the relationship between his employment, disease and disability. *See Love*, 27 BRBS 148; *Lombardi*, 22 BRBS at 326; *Curit*, 22 BRBS at 102. Consequently, as claimant had a period of two years, *i.e.*, up until April 12, 2005, to file a claim, we affirm the administrative law judge's conclusion that claimant's claim in this case, initially filed on November 16, 2004, is timely.[4] *Id.*

Employer next argues that the administrative law judge erred in finding that claimant's claim was not barred by Section 33(g) due to his failure to obtain its prior written approval with regard to a settlement offer from Eagle-Pitcher Industries Personal Injury Settlement Trust ("EPI Trust") of a third-party asbestos claim. Pursuant to Section 33(a), 33 U.S.C. §933(a), a claimant may proceed in tort against a third party if he determines that the third party may be liable for damages related to his work-related injuries. In order to protect an employer's right to offset any third-party recovery against its liability for compensation under the Act, 33 U.S.C. §933(f), a claimant, depending on the circumstances, must either give the employer notice of a settlement with a third party or a judgment entered against a third party, or he must obtain his employer's or carrier's

[4] The administrative law judge noted that "because amendments to claims are generally permitted, it is not necessary for me to find that the claimant's amendment to his claim was timely," since claimant's initial filing was timely, Decision and Order at 19. *See U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 613 n.7, 14 BRBS 631, 633 n.7 (1982). Nonetheless, the administrative law judge found that claimant's amendment dated April 6, 2005, to include asbestos exposure was likewise timely as it was filed within two years of the date that claimant became aware that he had a disability related to his occupational exposure. Employer's timeliness arguments primarily center around claimant's initial filing date, *i.e.*, November 16, 2004, and it has not challenged claimant's right to amend his claim.

prior written approval of the third-party settlement.[5] 33 U.S.C. §933(g); *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 26 BRBS 49(CRT) (1992); *see Bundens v. J.E. Brenneman Co.*, 46 F.3d 292, 29 BRBS 52(CRT) (3d Cir. 1995); *Esposito v. Sea-Land Service, Inc.*, 36 BRBS 10 (2002). Employer must show that claimant entered into fully executed settlements without its prior written approval in order to bar claimant's receipt of benefits under Section 33(g). *See Mallot & Peterson v. Director, OWCP*, 98 F.3d 1170, 30 BRBS 87(CRT) (9th Cir. 1996), *cert. denied*, 520 U.S. 1239 (1997); *Barnes v. Gen. Ship Serv.*, 30 BRBS 193 (1996).

The administrative law judge rejected employer's assertion that claimant's actions in the asbestos litigation precluded his recovery under the Act because the evidence of record is inadequate to establish that claimant entered into any third-party settlement. The evidence upon which employer relies, consisting of a June 11, 2001, "Plaintiff's Initial Fact Sheet," medical reports from Drs. Wilkenfeld and Levine documenting that claimant has asbestos-related pleural disease related to occupational exposure to asbestos, and an "Asbestos History and Examination Form" filled out by claimant on January 9, 2002, EX 3, does not contain any record of claimant's participation

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[5] Section 33(g), 33 U.S.C. §933(g) (emphasis added), states:

> (1) If the person entitled to compensation (or the person's representative) *enters into a settlement* with a third person referred to in subsection (a) of this section for an amount less than the compensation to which the person (or the person's representative) would be entitled under this chapter, the employer shall be liable for compensation as determined under subsection (f) of this section only if *written approval of the settlement* is obtained from the employer and the employer's carrier, *before the settlement is executed*, and by the person entitled to compensation (or the person's representative). The approval shall be made on a form provided by the Secretary and shall be filed in the office of the deputy commissioner within thirty days after the settlement is entered into.
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> (2) If no written approval *of the settlement* is obtained and filed as required by paragraph (1), or if the employee fails to notify the employer *of any settlement obtained from or judgment rendered against a third person*, all rights to compensation and medical benefits under this chapter shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this chapter.

in a lawsuit or settlement thereof. Thus, Section 33(g) does not apply in this case as there is no evidence that claimant obtained a settlement or judgment against any third-party.[6] Consequently, we affirm the administrative law judge's finding that claimant's claim is not barred by Section 33(g).[7] *See generally Barnes*, 30 BRBS at 196; *Formoso v. Tracor Marine, Inc.*, 29 BRBS 105 (1995).

Employer next asserts that the administrative law judge erred in finding that claimant's pulmonary condition is work-related. Employer contends that the administrative law judge erred by accepting claimant's self-serving and inconsistent statements about his asbestos exposure. Employer also argues that even if claimant can demonstrate that he experienced a physical harm, there is no probative evidence in the record showing that there was any asbestos at employer's IMTT terminal during the specific time period of claimant's alleged exposure, *i.e.*, August and September 1997.[8] Employer further argues that the administrative law judge improperly rejected Dr. Karetzky's opinion that claimant's disability is entirely attributable to his obesity. Employer asserts that the administrative law judge erroneously reached her own medical conclusion regarding the validity of Dr. Karetzky's opinion as to the cause of claimant's disability merely because claimant had lost 70 pounds between that examination and claimant's 2008 examination with Dr. Newman.

In determining whether an injury is work-related, a claimant is aided by the Section 20(a) presumption, which may be invoked only after he establishes a *prima facie* case. To establish a *prima facie* case, the claimant must show that decedent sustained a

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[6] If any recovery from the EPI Trust was in the form of a set amount representing liquated damages, only the notice provision of Section 33(g)(2) is applicable, as such payments are not "settlements." *Williams v. Ingalls Shipbuilding, Inc.*, 35 BRBS 92 (2001); *see also Banks v. Chicago Grain Trimmers Ass'n, Inc.*, 390 U.S. 459 (1968).

[7] If employer obtains evidence of a settlement, modification is available under Section 22 of the Act, 33 U.S.C. §922.

[8] We note that claimant initially filed his claim to allege occupational exposure to "sand dust and other dusts, chemicals and noxious agents," but subsequently amended it to more specifically involve exposure to asbestos, prompting the administrative law judge to find that "claimant's claim is limited to occupational disease arising from his alleged exposure to asbestos by the employer." Decision and Order at 20. In light of this finding, the administrative law judge limited his causation and responsible employer discussions to asbestos exposure, thereby finding claimant's inhalation of other occupational irritants irrelevant in this case.

harm or pain and that conditions existed or an accident occurred at his place of employment which could have caused the harm or pain. *American Stevedoring, Ltd. v. Marinelli*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996). The administrative law judge found claimant entitled to the Section 20(a) presumption with regard to his respiratory condition because Drs. Kipen, Newman, Saliba and Karetzky all opined that claimant has some degree of pulmonary impairment, and because "the parties have stipulated that the claimant sustained an injury to his respiratory system while working for the employer in August 1997." Decision and Order at 21; CXs 6, 7, 13; EXs 4, 5. The administrative law judge, however, alternatively found that even if the parties' stipulation is deemed insufficient to establish the working conditions element for purposes of Section 20(a), claimant's credible and uncontradicted testimony establishes that he was exposed to asbestos at the IMTT site.[9]

In this case, the record establishes that Drs. Kipen and Newman each opined that claimant has pulmonary disease causally related, at least in part, to asbestos exposure, CX 6, 7; EX 5, that Dr. Saliba made several different statements but ultimately opined that claimant had occupationally-related pulmonary disease,[10] CX 13, and that while Dr. Karetzky determined that claimant has chronic bronchitis, attributable to smoking, he nonetheless opined that claimant has a respiratory condition. EX 4. Additionally, the parties' joint stipulations, dated August 22, 2008, which included agreements that claimant injured his "respiratory system" and that the injury occurred at "IMTT Terminal, Bayonne, New Jersey," *see* Joint Stipulations, coupled with claimant's testimony that he believes he was exposed to asbestos in the course of his work for employer at the IMTT site,[11] is sufficient to establish the working conditions element for

[9] The administrative law judge found that employer did not introduce any evidence to contravene claimant's assertion that the pipe insulation or other pier debris at the site contained asbestos.

[10] Dr. Saliba indicated in a report he filled out on May 13, 2003, that claimant has acute asthma which was not related to his work. CX 13. On November 8, 2004, Dr. Saliba stated that claimant has chronic lung disease with obstructive pattern precipitated by fumes and dust inhaled during his work activities and that as a result he has "permanent lung dysfunction, which required him to retire early from his employment." CX 13. Dr. Saliba reiterated this position in a subsequent letter dated May 19, 2005 (claimant "should be disabled from working as a construction worker"). CX 13.

[11] Claimant stated that most of his work at the IMTT site involved the use of a demolition saw to cut out piping, plumbing, and especially the steam lines used to heat up the bunkoil, which he believed were "loaded with asbestos or a white substance." HT 21. Claimant added that he was exposed to a "constant" cloud of airborne particulates, including white powder, which he thought was asbestos. HT at 21-22. Moreover,

purposes of the Section 20(a) presumption. We therefore affirm the administrative law judge's finding that claimant is entitled to the Section 20(a) presumption that his respiratory condition is work-related.

Where, as here, claimant establishes a *prima facie* case, Section 20(a) applies to relate the disabling injury to the employment. Employer then can rebut this presumption by producing substantial evidence that the injury is not related to the employment. *Rainey v. Director, OWCP*, 517 F.3d 632, 42 BRBS 11(CRT) (2d Cir. 2008). While employer's burden on rebuttal is one of production and not persuasion, employer cannot meet this burden by simply producing any evidence. Rather, employer must produce "substantial evidence," which is "such relevant evidence as a reasonable mind might accept as adequate" to support a finding that the claimant's injury is not related to his workplace exposures. *Rainey*, 517 F.3d at 637, 42 BRBS at 14(CRT), *quoting Richardson v. Perales*, 402 U.S. 389, 401 (1971). If the employer rebuts the presumption, it no longer controls and the issue of causation must be resolved on the evidence of record as a whole, with the claimant bearing the burden of persuasion. *Universal Maritime Corp. v. Moor*e, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

Addressing rebuttal, the administrative law judge rejected Dr. Karetzky's opinion that claimant has chronic bronchitis caused entirely by his smoking and obesity because he did not address the issue of asbestos-related abnormalities present in the records which the physician purportedly reviewed. In particular, the administrative law judge found that Dr. Karetzky's opinion did not address medical records from 2000-2002 that reflected claimant's diagnosis of asbestos-related pulmonary abnormalities linked to his work.[12] The administrative law judge found that this omission was particularly troubling given that the main purpose for Dr. Karetzky's evaluation was to determine whether claimant had any occupationally-related health conditions. Additionally, the administrative law judge found that Dr. Karetzky's conclusion regarding the contribution of claimant's obesity to his pulmonary condition "may not be accurate" given that claimant had, subsequent to his examination by Dr. Karetzky, "substantially" reduced his weight. Decision and Order at 24. As the administrative law judge found that the bases for Dr.

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claimant stated that while he could not say for a fact that it was asbestos, he "could be 99% sure it was asbestos," given that his work involved cutting into steam pipes which were typically coated with asbestos material. HT at 69.

[12] Dr. Karetzky stated that among other documents he reviewed "an X-ray report of Dr. Richard Levine (11/4/00)," as well as "the report of Dr. Wilkenfeld (3/15/02)" and various hospital and physicians' records, all of which acknowledged claimant's occupational exposure to asbestos. EX 4.

Karetzky's opinion are unreliable, he could properly find it did not constitute "substantial evidence" for purposes of establishing rebuttal under Section 20(a). *Rainey*, 517 F.3d at 637, 42 BRBS at 14(CRT); *see generally Burley v. Tidewater Temps, Inc.*, 35 BRBS 185 (2002). Consequently, we affirm the administrative law judge's finding that Dr. Karetzky's opinion is insufficient to establish rebuttal. *Id.*

Moreover, as there is no error in the administrative law judge's weighing of the evidence on causation based on the record as a whole, we affirm her alternative finding that claimant established by a preponderance of the evidence that his respiratory condition is related to his work for employer. *Marinelli v. American Stevedoring, Ltd.*, 34 BRBS 112 (2000), *aff'd*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001). In this regard, the administrative law judge rationally accorded more weight to Dr. Newman's opinion that claimant has asthma and asbestos-induced pleural disease as a result of cumulative occupational exposure to asbestos in his work as a dock builder than to Dr. Karetzky's contrary opinion because of his superior credentials, *i.e.*, he is Board-certified in both internal medicine and pulmonary disease whereas Dr. Karetzky is Board-certified in internal medicine, and because his opinion is better supported by its underlying documentation.[13] *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962).

Employer further argues that the administrative law judge erred in finding that it is the responsible employer. Employer maintains that it submitted evidence documenting claimant's admissions that he was exposed to asbestos while working with other employers after 1997. In support of its contention, employer posits that statements made by claimant on or around June 13, 2001, and March 15, 2002, that he was exposed to asbestos from 1967 to the present, establish that claimant continued to be exposed to asbestos in covered employment well beyond his last work for employer.

Pursuant to *Travelers Ins. Co. v. Cardillo*, 225 F.2d 137 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955), the responsible employer in an occupational disease case is the last covered employer to expose the employee to injurious stimuli prior to the date he becomes aware that he is suffering from an occupational disease arising out of his employment. *See also Todd Shipyards Corp. v. Black*, 717 F.2d 1280, 16 BRBS 13(CRT) (9th Cir. 1983), *cert. denied*, 466 U.S. 937 (1984); *Zeringue v. McDermott, Inc.*,

[13] Thus, the administrative law judge's discussed and weighed Dr. Karetzky's opinion in resolving the causation issue. *See* Decision and Order at 23-24. Consequently, we reject employer's contention that the administrative law judge completely disregarded Dr. Karetzky's opinion.

32 BRBS 275 (1998). To defeat liability, employer bears the burden of establishing it is not the responsible employer, and it can meet this burden by establishing that the employee was exposed to injurious stimuli while working for a subsequent covered employer. *See, e.g., Cooper/T. Smith Stevedoring Co., Inc. v. Liuzza*, 293 F.3d 741, 36 BRBS 18(CRT) (5th Cir. 2002); *Newport News Shipbuilding & Dry Dock Co. v. Stilley*, 243 F.3d 179, 35 BRBS 12(CRT) (4th Cir. 2001); *Avondale Industries, Inc. v. Director, OWCP*, 977 F.2d 186, 26 BRBS 111(CRT) (5th Cir. 1992); *General Ship Serv. v. Director, OWCP*, 938 F.2d 960, 25 BRBS 22(CRT) (9th Cir. 1991); *Suseoff v. San Francisco Stevedoring Co.*, 19 BRBS 149 (1986).

In concluding that employer did not establish that claimant had later exposure to asbestos while working for a different covered employer, the administrative law judge relied on claimant's testimony that he thought his work at IMTT was "the last place that I could ever have" been exposed to asbestos. HT at 67-68. The administrative law judge additionally found that, assuming claimant had other occupational exposures to asbestos, employer did not establish that any of this exposure occurred with a subsequent covered employer. In this regard, the administrative law judge explicitly addressed claimant's statements that he was exposed to asbestos while working at a Con Edison site, finding it irrelevant to the responsible employer issue in this case because the only evidence of this employment establishes that it occurred in 1992, before the 1997 exposure claimant incurred at the IMTT site. Additionally, the administrative law judge rejected employer's assertion that claimant's general statements that he was exposed to asbestos over the course of his employment in dock repair from 1967 to 2003 as being too vague to establish that claimant was, in fact, exposed to injurious stimuli while working for a subsequent covered employer. Specifically, the administrative law judge found that the listing of claimant's employers does not establish that these employers are subject to the Act, or that claimant, whose work involved both covered and non-covered employment, was engaged in work covered by the Act at the time of any purported subsequent exposures. As employer did not offer any evidence to establish that claimant was last exposed to asbestos with a subsequent covered employer, we affirm the administrative law judge's conclusion that employer is liable under the Act for claimant's compensation and medical benefits. *Lewis v. Todd Pacific Shipyards Corp.*, 30 BRBS 154 (1996).

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

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